

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GUY KEVIN ROWLAND,

No. C 94-3037 WHA

Petitioner,

**ORDER GRANTING SUMMARY
JUDGMENT FOR RESPONDENT**

v.

KEVIN CHAPPELL, Warden,

Respondent.

Petitioner Guy Kevin Rowland, a California state prisoner sentenced to death, seeks a writ of habeas corpus under 28 U.S.C. 2254. Respondent now moves for summary judgment on all of petitioner's claims. For the following reasons, respondent's motion is **GRANTED**.

FACTUAL BACKGROUND¹

On February 11, 1987, petitioner Guy Kevin Rowland was charged with one count of first-degree murder with the special circumstance that the murder took place during the commission of rape and one count of rape. The information alleged 12 prior felony convictions and that petitioner was on parole when he committed the offense.

Petitioner was represented at trial by attorneys Charles Pierpont and James Courshon.

¹ These facts are taken from *People v. Rowland*, 4 Cal. 4th 238 (1992). Under 28 U.S.C. 2254(e)(1), the factual findings made by the California Supreme Court are presumptively correct.

1 Evidence at trial established that on March 16, 1986, Marion Geraldine (“Geri”) Richardson
2 went to the “Wild Idle” bar in Byron, Contra Costa County.² Geri lived with her mother in
3 Byron and worked as a cook at the Boys’ Ranch. She regularly snorted methamphetamine and
4 evidently had a vial of the substance in her possession.

5 Petitioner was also at the bar. He socialized with Geri for a while. According to an off-
6 duty bartender, petitioner was “coming on” to Geri, but she did not respond positively.
7 Before 10 p.m., petitioner left the bar. Some time later, Geri told her friend, Jeanne Weems,
8 that she had a terrible headache and needed to go home to get some sleep as she had to go to
9 work early the next morning. She left the bar alone. Apparently, she drove away in her car.
10 Her vehicle was later seen parked at an odd angle about half a block from the bar. It was empty
11 and unlocked.

12 In the hours that followed, petitioner brutally beat Geri about the head, face and
13 elsewhere. He also had intercourse with her, evidently against her will. According to expert
14 testimony, Geri had a bruise on her inner thigh which could have been caused by someone using
15 a knee to force the knees apart. Petitioner also choked Geri twice, killing her the second time.
16 Before her death, Geri ingested a potentially lethal dose of methamphetamine. It appears that
17 petitioner put the methamphetamine in her mouth, as apparently she could not have snorted the
18 requisite amount of the substance or would not have done so voluntarily.

19 Petitioner hauled Geri’s body in his truck to the vicinity of Half Moon Bay, dragged it
20 across the ground and dumped it in the ocean. On March 17, at around 7 a.m., petitioner arrived
21 at the house of his lover, Susan Lanet, in Livermore. He appeared disturbed and said he wanted
22 to leave the state. Petitioner and Lanet shared some methamphetamine. He admitted to Lanet
23 that he had killed Geri and asked her whether she wanted Geri’s belongings, including a ring
24 and make-up. Lanet declined. Petitioner offered her \$20 to clean his truck and remove “blood
25 and every strand of hair.” Lanet pretended to accept, but then called the police. Petitioner was
26 arrested as he attempted to flee. At around 9:45 a.m., Geri’s body was found at the base of a
27

28 ² The parties refer to the victim as “Geri”; the state court opinion refers to her as
“Marion R.”

1 cliff by Moss Beach near Half Moon Bay. Blood and other evidence in petitioner's vehicle tied
2 him to the killing.

3 At the guilt phase of the trial, petitioner did not present any evidence, call witnesses or
4 take the stand. His primary defense was that the evidence did not establish first-degree murder
5 or rape. On May 13, 1987, the jury convicted petitioner of first-degree murder and rape and
6 also found true the special circumstance allegation of felony murder in the course of rape.

7 During the penalty phase, the prosecution offered in aggravation: (1) the circumstances
8 of the offenses, (2) other criminal activity perpetrated by petitioner, and (3) his prior felony
9 convictions. As to other violent criminal activity, the prosecution presented evidence during the
10 penalty phase to the following effect:

11 On April 4, 1978, petitioner entered the residence of Harriet Larson in San Ramon.
12 Attempting to escape, he battered Larson, who was 63 years old. She suffered a crushed
13 vertebra and was hospitalized for 11 days.

14 On October 4, 1980, petitioner lured 26 year-old Tereza V. out of a bar in Pleasanton to
15 a park with an offer to share cocaine. At the park, he made sexual advances. She rebuffed him.
16 He assaulted, battered and raped her.

17 On November 7, 1980, together with a male partner, petitioner lured Lisa V. and Caren
18 F. into a truck in Fremont with a false offer of a ride. Both girls were 13 years old. Petitioner
19 and his counterpart then kidnapped the girls. Caren escaped. Petitioner helped his partner rape
20 Lisa twice. He raped her six times, caused her to orally copulate him, sodomized her twice, and
21 fondled her. During the attack, he threatened her with death if she resisted.

22 On March 11, 1986, petitioner got into an argument with his step-sister, Keli T., in the
23 home she shared with her mother and stepfather in Pleasanton. They argued about the locking
24 of a door. The underlying cause, however, was apparently something else: petitioner had
25 expressed a romantic interest in Keli. She responded with antagonism. During the argument,
26 petitioner picked up a knife and punched his fist through the door of Keli's bedroom. Petitioner
27 assaulted her and threatened her with death.

28 On March 11, 1986, petitioner was introduced to Patricia G. by Susan Lanet at Lanet's

1 home. The trio used methamphetamine. Later, petitioner offered to drive Patricia G. home.
2 Instead, he drove her to the top of a cliff that loomed over a body of water. During the trip, he
3 beat her. At the cliff, he pulled her out of the car, beat her, told her he was going to kill her and
4 throw her body off the cliff. He told her to undress. She complied. He continued to beat and
5 choke her. Although the matter is uncertain, he may have raped her. He then drove her to his
6 mother's house, where he kept her in the bathroom against her will for a time period. He called
7 Lanet and admitted what he had done. Petitioner asked Patricia for some time before she called
8 the police and then fled.

9 As to prior felony convictions, the prosecution presented evidence that petitioner was
10 convicted on June 8, 1981, of the following offenses arising out of the Lisa V./Caren F.
11 incident: two counts of sodomy, one count of lewd and lascivious conduct with a child under
12 fourteen years of age, and one count of oral copulation.

13 In mitigation, petitioner offered evidence to the following effect. He was born into a
14 middle class family in 1961. He had a brother and two sisters and was at least of average
15 intelligence. His parents had a violent, alcoholic marriage. His mother, especially,
16 neglected and abused him. She twice attempted to drown him in the bathtub when he was a
17 baby. As a toddler, he experienced night terrors and convulsions. At a young age, he
18 commenced psychotherapy and drug therapy. In school, he experienced learning disabilities
19 and behavioral problems. With time, he started to abuse alcohol and drugs. He went on to
20 spend time in correctional facilities. At various points in life, petitioner was diagnosed with
21 various mental conditions, including hyperactivity. At the time of trial, when he was 26,
22 petitioner was diagnosed with borderline personality disorder.

23 Petitioner also offered the background of members of his family. His parents each came
24 from violent, alcoholic backgrounds. His mother was sexually molested by her father. His
25 father, at age eleven, was given gifts in exchange for sexual favors by a neighborhood man.
26 Petitioner's mother once put his sister's head in the oven when she was a baby and turned the
27 gas on. His father later sexually molested that same sister. Under the influence of alcohol, his
28 father abused his mother.

Following deliberations after the penalty phase, the jury returned a verdict of death for the murder of Geri.

PROCEDURAL BACKGROUND

The California Supreme Court affirmed petitioner's conviction on December 17, 1992, *Rowland*, 4 Cal. 4th at 238, and summarily denied his petition for a writ of habeas corpus on June 1, 1994. On June 28, 1996, petitioner filed a federal habeas petition. This petition was later amended to delete unexhausted claims. An amended petition containing newly exhausted claims was filed on August 6, 1997. Respondent filed an answer on October 16, 1997. On January 16, 1998, petitioner filed a traverse.

On August 15, 2002, an order herein determined that claims 6, 8 and 10, as well as portions of claims 13 and 14, were procedurally defaulted. Subsequent orders ruled that petitioner had failed to demonstrate cause and prejudice to overcome the defaults. On November 30, 2005, petitioner filed a motion to once again amend his petition. The motion was granted. The third amended petition was filed on October 29, 2007. A corrected copy was filed on November 19, 2007. An amended answer was filed on March 24, 2008. An amended traverse was filed on September 16, 2009.

Respondent now brings a motion for summary judgment on all claims in the petition. Petitioner opposes respondent's motion and requests an evidentiary hearing on all claims.

LEGAL STANDARDS

1. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

AEDPA applies to this case because petitioner filed his original habeas petition on June 28, 1996, several months after the enactment of the AEDPA.³ *See Woodford v. Garceau*, 538

³ This court has already held that AEDPA applies to this case. *See Order Regarding Cause and Prejudice* filed September 14, 2010. Nonetheless, petitioner now maintains that AEDPA does not apply. Petitioner recognizes that he filed his petition after AEDPA's effective date, but argues that because he filed a motion for stay of execution prior to AEDPA's effective date, AEDPA should not apply. Petitioner is wrong. As the Supreme Court made clear in *Woodford v. Garceau*, the filing of a motion for stay, appointment of counsel, and/or a statement of non-frivolous claims does not constitute a filing of a petition under AEDPA. 538 U.S. 202, 208-10 (2003). Rather, the triggering date is the filing of the original petition, which petitioner does and must acknowledge was filed on June 28, 1996, after the enactment of AEDPA, and thus subject to its requirements.

1 U.S. 202, 206 (2003). Pursuant to AEDPA, a district court may not grant a writ of habeas
2 corpus with respect to any claim that was adjudicated on the merits in state court unless the
3 state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or
4 involved an unreasonable application of, clearly established Federal law, as determined by the
5 Supreme Court of the United States; or (2) resulted in a decision that was based on an
6 unreasonable determination of the facts in light of the evidence presented in the State court
7 proceeding." 28 U.S.C. 2254(d). A federal court must presume the correctness of the state
8 court's factual findings, and the presumption of correctness may only be rebutted by clear and
9 convincing evidence. 28 U.S.C. 2254(e)(1).

10 The "contrary to" and "unreasonable application" clauses of Section 2254(d) have
11 separate and distinct meanings. A state court's decision is "contrary to" clearly established
12 United States Supreme Court law if it fails to apply the correct controlling authority or if it
13 applies the controlling authority to a case involving facts materially indistinguishable from
14 those in a controlling case, but nonetheless reaches a different result. *See Williams v. Taylor*,
15 529 U.S. 362, 404, 413-14 (2000). A decision is an "unreasonable application" of United States
16 Supreme Court law if "the state court identifies the correct governing legal principle . . . but
17 unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 414. In
18 *Harrington v. Richter*, the Supreme Court further clarified that "'an *unreasonable* application of
19 federal law is different from an *incorrect* application of federal law.'" 131 S. Ct. 770, 785
20 (2011) (citing *Williams*, 529 U.S. at 410) (emphasis in original). "A state court's determination
21 that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could
22 disagree' on the correctness of the state court's decision." *Id.* at 786 (citing *Yarborough v.*
23 *Alvarado*, 541 U.S. 653, 664 (2004)).

24 "[A] federal habeas court may not issue the writ simply because the court concludes in
25 its independent judgment that the relevant state-court decision applied clearly established
26 federal law erroneously or incorrectly. Rather, that application must be objectively
27 unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). "While the 'objectively
28 unreasonable' standard is not self-explanatory, at a minimum it denotes a great[] degree of

1 deference to the state courts.” *Clark v. Murphy*, 331 F.3d 1062, 1068 (9th Cir. 2003).

2 Holdings of the Supreme Court at the time of the state court decision are the only
3 definitive source of clearly established federal law under AEDPA. *See Williams*, 529 U.S. at
4 412. While circuit law may be “persuasive authority” for purposes of determining whether a
5 state court decision is an unreasonable application of Supreme Court law, only the Supreme
6 Court’s holdings are binding on the state courts and only those holdings need be reasonably
7 applied. *See Clark*, 331 F.3d at 1070.

8 When a federal court is presented with a state court decision that is unaccompanied by a
9 rationale for its conclusions, there is no basis other than the record “for knowing whether the
10 state court correctly identified the governing legal principle or was extending the principle into
11 a new context.” *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). In such situations, federal
12 courts must conduct an independent review of the record to determine whether the state court
13 decision is objectively unreasonable. *Ibid.* Specifically, “where a state court’s decision is
14 unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing
15 there was no reasonable basis for the state court to deny relief.” *Richter*, 131 S. Ct. at 784.

16 While federal courts “‘are not required to defer to a state court’s decision when that
17 court gives [them] nothing to defer to, [they] must still focus primarily on Supreme Court cases
18 in deciding whether the state court’s resolution of the case constituted an unreasonable
19 application of clearly established federal law.’” *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th
20 Cir. 2002) (quoting *Fisher v. Roe*, 263 F.3d 906, 914 (9th Cir. 2001)). Furthermore, independent
21 review of the record is not *de novo* review of the constitutional issue, but rather the only way a
22 federal court can determine whether a silent state court decision is objectively unreasonable.
23 *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

24 Even if a petitioner meets the requirements of Section 2254(d), habeas relief is
25 warranted only if the constitutional error at issue had a substantial and injurious effect or
26 influence in determining the jury’s verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).
27 Under this standard, petitioners “may obtain plenary review of their constitutional claims, but
28 they are not entitled to habeas relief based on trial error unless they can establish that it resulted

in ‘actual prejudice.’” *Brecht*, 507 U.S. at 637 (citing *United States v. Lane*, 474 U.S. 438, 439 (1986)).

2. EVIDENTIARY HEARING UNDER AEDPA

In his opposition to respondent’s motion for summary judgment, petitioner requests an evidentiary hearing on every claim.

Section 2254(d), as amended by AEDPA provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. 2254(d). The Supreme Court held in *Cullen v. Pinholster* that “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” 131 S. Ct. 1388, 1398 (2011).

While the central holding of *Pinholster* pertains to Section 2254(d)(1), the Supreme Court unambiguously observed that “§ 2254(d)(2) includes the language ‘in light of the evidence presented in the State court proceeding,’” providing “additional clarity” that review under Section 2254(d)(2) is limited to the state court record. *Pinholster*, 131 S. Ct. at 1400 n.7. A reviewing court is, therefore, no more able to consider new evidence developed at a federal evidentiary hearing when determining whether a petitioner has satisfied Section 2254(d)(2) than it is when considering Section 2254(d)(1). Thus, while a federal court may continue to consider new evidence when applying *de novo* review, such review is available only after a petitioner has satisfied Section 2254(d). See *Panetti v. Quarterman*, 551 U.S. 930, 953-54 (2007) (holding that when “the requirement set forth in § 2254(d)(1) is satisfied[, a] federal court must then resolve the claim without the deference AEDPA otherwise requires”); *Maxwell v. Roe*, 628 F.3d

486, 494-495 (9th Cir. 2010) (“[W]hen a state court adjudication is based on an antecedent unreasonable determination of fact, we proceed to consider the petitioner’s related claim de novo”); *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (holding that where “there is [§ 2254(d)(1)] error, we must decide the habeas petition by considering de novo the constitutional issues raised”). Moreover, even where a petitioner has had no hearing on his claim in state court, the federal court must consider whether his claim could satisfy Section 2254(d) before holding a hearing. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Thus, this order finds that petitioner Rowland must satisfy the requirements of Section 2254(d) on the basis of the state court record before he may show that he is entitled to an evidentiary hearing.

3. SUMMARY JUDGMENT

Summary judgment is appropriate where the moving party demonstrates “that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law.” Fed. R. Civ. Pro. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The motion should not be granted, however, if a reasonable trier of fact, viewing the evidence in the light most favorable to the non-moving party, could resolve a material issue in the nonmoving party’s favor. *See ibid.* at 248-49; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir. 1991).

4. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, petitioner must show both that counsel’s performance was deficient and that the deficient performance prejudiced petitioner’s defense. *Ibid.* at 688. To prove deficient performance, petitioner must demonstrate that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms. *Ibid.*; *see also Bobby v. Van Hook*, 130 S. Ct. 13, 18 (2009) (*per curiam*) (noting that guidelines, such as those promulgated by the American Bar Association, purporting to establish what reasonable attorneys would do may be helpful but are not the test for determining whether counsel’s choices are objectively reasonable). This requires showing that counsel made errors so serious that counsel was not

1 functioning as the "counsel" guaranteed by the Sixth Amendment. *See Strickland*, 466 U.S. at
2 687-88.

3 The relevant inquiry is not what defense counsel could have done, but rather whether the
4 choices made by defense counsel were reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170,
5 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and
6 a court must indulge a strong presumption that counsel's conduct falls within the wide range of
7 reasonable professional assistance. *See Strickland*, 466 U.S. at 689; *Wildman v. Johnson*, 261
8 F.3d 832, 838 (9th Cir. 2001); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). The
9 reasonableness of counsel's decisions must be measured against the prevailing legal norms at
10 the time counsel represented the defendant. *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003); *see*
11 *also Jennings v. Woodford*, 290 F.3d 1006, 1016 (9th Cir. 2002) (finding deficient performance
12 where counsel who had settled on alibi defense failed to investigate possible mental defense
13 despite state supreme court decision before trial that in such instances counsel is not excused
14 from investigating the potential mental defense). A difference of opinion as to trial tactics does
15 not constitute denial of effective assistance, *see United States v. Mayo*, 646 F.2d 369, 375 (9th
16 Cir. 1981), and tactical decisions are not ineffective assistance simply because in retrospect
17 better tactics are known to have been available. *See Bashor v. Risley*, 730 F.2d 1228, 1241 (9th
18 Cir.).

19 Under AEDPA, "[t]he pivotal question is whether the state court's application of the
20 *Strickland* standard was unreasonable. This is different from asking whether defense counsel's
21 performance fell below *Strickland*'s standard." *Richter*, 131 S. Ct. at 785. The state decision
22 under review need not explain the state court's reasoning, and the habeas petitioner still bears
23 the burden to show there was no reasonable basis for the state court to deny relief. *Id.* at 784.

24 To prove counsel's performance was prejudicial, petitioner must demonstrate a
25 "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
26 would have been different. A reasonable probability is a probability sufficient to undermine
27 confidence in the outcome." *Strickland*, 466 U.S. at 694. A petitioner must show that counsel's
28 errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

1 *Id.* at 688. The test for prejudice is not outcome-determinative, *i.e.*, defendant need not show
2 that the deficient conduct more likely than not altered the outcome of the case; however, a
3 simple showing that the defense was impaired is also not sufficient. *Id.* at 693.

4 The *Strickland* prejudice analysis is complete in itself. Therefore, there is no need for
5 additional harmless error review pursuant to *Brecht*, 507 U.S. at 637. *Musladin v. Lamarque*,
6 555 F.3d 830, 834 (9th Cir. 2009); *Avila v. Galaza*, 297 F.3d 911, 918 n.7 (9th Cir. 2002).

7 ANALYSIS

8 1. CLAIM 1

9 In Claim 1, petitioner maintains that his trial attorneys were ineffective for failing to
10 investigate and present potentially meritorious mental defenses at the guilt phase. This claim
11 was raised in petitioner's first state habeas petition and denied on the merits in a summary
12 opinion by the California Supreme Court.

13 Petitioner is unable to cite to any clearly established federal law that would entitle him
14 to relief, and a review of the record does not demonstrate that the state court was objectively
15 unreasonable in denying this claim. As discussed *supra*, in order to establish ineffective
16 assistance of counsel, petitioner must show both that counsel's performance was deficient and
17 that the deficient performance prejudiced petitioner's defense. *Strickland*, 466 U.S. at 688. To
18 prove deficient performance, petitioner must demonstrate that counsel's representation fell
19 below an objective standard of reasonableness under prevailing professional norms. *Ibid.* To
20 prove counsel's performance was prejudicial, petitioner must demonstrate a "reasonable
21 probability that, but for counsel's unprofessional errors, the result of the proceeding would have
22 been different. A reasonable probability is a probability sufficient to undermine confidence in
23 the outcome." *Ibid.* at 694.

24 The United States Supreme Court and the Ninth Circuit have affirmed that adequate
25 counsel in a capital case has an "obligation to conduct a thorough investigation of the
26 defendant's background." *Wiggins*, 539 U.S. at 522. At a minimum, counsel must conduct a
27 reasonable investigation enabling him or her to make informed decisions as to how best
28 represent his or her client. *Sanders*, 21 F.3d at 1457.

1 Although counsel is obligated to investigate a capital defendant's background, it is:
2 clearly within the 'wide range of professionally competent assistance' for
3 [defense counsel] to choose not to present a psychiatric defense theory that might
4 conflict with [other defenses and/or mitigation]. It is also acceptable trial
5 strategy to choose not to call psychiatrists to testify when they can be subjected
6 to cross-examination based on equally persuasive psychiatric opinions that reach
7 a different conclusion.

8 *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990).

9 Here, petitioner has not established that his defense counsel failed to conduct an
10 adequate investigation into his mental health. The record establishes that on May 28, 1986,
11 well before petitioner's trial began in March 1988, defense counsel retained psychiatrist Dr.
12 George Wilkinson to conduct an examination of petitioner (Exh. 21 of App. No. 16). As
13 petitioner acknowledges, Dr. Wilkinson concluded prior to trial that there was no viable mental
14 defense. Petitioner's Amended Reply to Respondent's Answer to Third Amended Petition at
15 17.

16 In August 1986, defense counsel also retained psychologist Dr. Albert Fricke, who
17 conducted psychological testing of petitioner (Exhs. 23 and 49 of App. No. 16). In addition,
18 defense counsel sent an investigator to interview Dr. Arthur Mattocks, a mental health
19 professional who had treated petitioner at the California Medical Facility (Exh. 24 of App. No.
20 16). Finally, defense counsel retained Dr. Hugh Ridlehuber to evaluate petitioner for ADHD in
21 February 1988 (approximately one month before the start of the guilt-phase trial) at the
22 suggestion of Drs. Wilkinson and Fricke, because Dr. Ridlehuber was considered a local expert
23 on the subject (Exhs. 50 & 51 of App. No. 16). Dr. Ridlehuber was retained after the guilt
24 phase as well to conduct an in-depth examination of petitioner and to testify regarding his
25 mental health at the penalty phase. None of the doctors testified at the guilt phase.

26 The gravamen of petitioner's claim is that his counsel ought to have retained Dr.
27 Ridlehuber earlier and instructed him to conduct a full examination of petitioner prior to the
28 guilt phase. While Dr. Ridlehuber testified at the penalty phase that petitioner suffered a
borderline personality disorder, he also testified that he found no evidence of organic brain
dysfunction or schizophrenia (RT 6757, 6769, 6796-97). He has since stated, however, in a

1 declaration that was before the California Supreme Court at the time it considered and rejected
2 this claim, that had he been able to thoroughly examine petitioner prior to the guilt phase, he
3 would have “advised defense counsel to seriously consider legal insanity as a defense during the
4 guilt phase of trial” (Exh. No. 50 of App. No. 16 at 5).

5 The investigation conducted by counsel was reasonable under the circumstances. *See*
6 *Siripongs v Calderon*, 133 F.3d 732, 736 (9th Cir. 1998) (stating the “[t]he relevant inquiry
7 under *Strickland* is not what defense counsel could have pursued, but rather whether the choices
8 made by defense counsel were reasonable.”) The record confirms that petitioner’s counsel
9 explored the possibility of a mental defense by retaining and consulting with multiple mental
10 health professionals. Dr. Ridlehuber acknowledged that neither Dr. Fricke nor Dr. Wilkinson
11 believed that there was a psychiatric defense available to petitioner (Exh. 51 of App. No. 16 at
12 3), and it was reasonable for defense counsel to rely on their expertise. Additionally, Dr.
13 Fricke has averred — in a declaration that was before the California Supreme Court at the time
14 it considered and rejected this claim — that he met with petitioner three times and conducted
15 various tests. Dr. Fricke has further declared that based on the testing and analysis that he
16 performed on petitioner, as well as that done by Dr. Wilkinson, Dr. Fricke did not find, *inter*
17 *alia* “cognitive deficits suggestive of other neurological problems” (Exh. 49 of App. No. 16 at
18 3-4). The fact that Dr. Ridlehuber now declares that he would have suggested the consideration
19 of a defense of legal insanity had he been retained earlier does not mean that the investigative
20 choices that counsel *did* make were unreasonable, and petitioner can cite to no decisions so
21 establishing.

22 “In assessing the reasonableness of an attorney’s investigation, . . . a court must consider
23 not only the quantum of evidence already known to counsel, but also whether the known
24 evidence would lead a reasonable attorney to investigate further.” *Wiggins*, 539 U.S. at 537.
25 Having reviewed the record of this case, this order finds that it was reasonable for petitioner’s
26 counsel not to retain additional mental health professionals, and there was no cause for counsel
27 to have retained Dr. Ridlehuber prior to the time that they did. That counsel arranged for
28 multiple mental health professionals to evaluate petitioner confirms that they considered a

1 mental defense well before trial commenced. A statement by Dr. Ridlehuber that he may have
2 disagreed with the other experts had he been retained earlier does not establish ineffective
3 assistance of counsel. As the Supreme Court has recognized, “psychiatrists disagree widely and
4 frequently on what constitutes mental illness,” *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985), and
5 *Strickland* and its progeny command only that defense counsel conduct a thorough and
6 reasonable investigation, not that they continue to consult with experts indefinitely until one is
7 found to support a particular defense.

8 Accordingly, this order finds and concludes that petitioner has not demonstrated that his
9 counsel were deficient in their investigation of his mental health nor in their conduct regarding
10 potential presentation of mental health evidence at his guilt phase trial. While it is not required
11 to do so, this court also finds that petitioner cannot show prejudice as a result of counsel’s
12 actions. The United States Supreme Court has never required defense counsel to pursue every
13 nonfrivolous claim or defense, regardless of its merit, viability, or realistic chance of success.
14 *Knowles v. Mirzayance*, 556 U.S. 111, 125, 127 (2009). And attempting to establish an insanity
15 defense at the guilt phase trial may well have opened the door to the prosecution introducing
16 evidence of petitioner’s history of violent sex offenses, thereby negating any possible advantage
17 of an insanity defense. *See, e.g. Brodit v. Cambra*, 350 F.3d 985, 994 (9th Cir. 2003) (finding
18 that state court reasonably concluded that trial attorney provided effective assistance of counsel
19 where attorney declined to present evidence favorable to defense out of concern that it would
20 open door to unfavorable evidence).

21 Because petitioner cannot establish either that his counsel’s performance was deficient
22 or that any alleged deficiencies were prejudicial, and given that a reviewing court must indulge
23 a strong presumption that counsel’s conduct falls within the wide range of reasonable
24 professional assistance, petitioner has not satisfied the requirements of Section 2254(d) and
25 both his claim and his request for an evidentiary hearing must be denied. *Strickland*, 466 US at
26 688; *Sanders*, 21 F.3d at 1456. Respondent’s motion for summary judgment on this claim is
27 granted.

28 **2. CLAIM 2**

1 In Claim 2, petitioner maintains that his trial attorneys were ineffective for failing to
2 investigate and present mitigating psychiatric evidence at the penalty phase trial. Specifically,
3 petitioner argues that trial counsel contacted Dr. Ridlehuber (who testified at the penalty phase)
4 too late and failed to provide him with important evidence. As a result, according to petitioner,
5 strong mitigating evidence was not presented to the penalty phase jury. This claim was raised
6 in petitioner's first state habeas petition and denied on the merits in a summary opinion by the
7 California Supreme Court.

8 Petitioner is unable to cite to any clearly established federal law that would entitle him
9 to relief, and a review of the record does not demonstrate that the state court was objectively
10 unreasonable in denying this claim. As discussed *supra*, in order to establish ineffective
11 assistance of counsel, petitioner must show both that counsel's performance was deficient and
12 that the deficient performance prejudiced petitioner's defense. *Strickland*, 466 U.S. at 688. To
13 prove deficient performance, petitioner must demonstrate that counsel's representation fell
14 below an objective standard of reasonableness under prevailing professional norms. *Ibid.* To
15 prove counsel's performance was prejudicial, petitioner must demonstrate a "reasonable
16 probability that, but for counsel's unprofessional errors, the result of the proceeding would have
17 been different. A reasonable probability is a probability sufficient to undermine confidence in
18 the outcome." *Ibid.* at 694.

19 Trial counsel has a duty to investigate in capital penalty phase proceedings. *Summerlin*
20 *v. Schriro*, 427 F.3d 623, 629-30 (9th Cir. 2005). Our Court of Appeals has also held that, in
21 order to prepare for the penalty phase of a capital trial, capital counsel "must conduct sufficient
22 investigation and engage in sufficient preparation to be able to present and explain the
23 significance of all the mitigating evidence." *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir.
24 2002 (*en banc*) (citations omitted).

25 This order has already addressed petitioner's contention that Dr. Ridlehuber was hired
26 too late in its discussion of Count 1, *supra*. Petitioner's attorneys retained a psychiatrist and a
27 psychologist, and then Dr. Ridlehuber himself examined petitioner and testified extensively at
28 the penalty phase. In fact, Dr. Ridlehuber himself testified that he interviewed and examined

1 petitioner for 12 hours and researched the case for an additional 14 hours (RT 6755). The
2 record does not reflect, however, that Dr. Ridlehuber indicated to counsel at the time he was
3 retained or at the time of the penalty phase trial that he believed that he had not had adequate
4 time to examine petitioner or that he had been retained too late to perform a thorough
5 evaluation.

6 Trial counsel in capital cases are required to conduct a thorough investigation of a
7 defendant's background, but they are *not* required to hire any particular mental health
8 professional, nor, as stated, are they required to consult multiple doctors until one is found who
9 will advocate a psychiatric defense. Given counsel's retention of multiple mental health experts
10 and the corresponding investigation into petitioner's mental health, petitioner cannot
11 demonstrate that it was ineffective assistance for his counsel not to have specifically retained
12 Dr. Ridlehuber at an earlier time. *Strickland*, 466 U.S. at 688; *Siripongs*, 133 F.3d at 736.

13 Petitioner also argues that his trial counsel did not properly prepare Dr. Ridlehuber or
14 provide him with necessary information about petitioner. Inadequate preparation of a defense
15 mental health expert witness can amount to deficient performance. *See, e.g., Bean v. Calderon*,
16 163 F.3d 1079, 1078-81 (9th Cir. 1998). Moreover, counsel in a capital case have a duty to
17 provide background information to their penalty phase mental health expert, even if the expert
18 does not request such evidence. *Wallace v. Stewart*, 184 F.3d 1112, 1118 (9th Cir. 1999).

19 Here, however, defense counsel *did* investigate petitioner's background and provided
20 Dr. Ridlehuber with multiple sources of information about petitioner. Dr. Ridlehuber testified
21 that he reviewed petitioner's family history, information from a doctor who treated petitioner as
22 a child, and reports from a defense investigator who had interviewed a number of petitioner's
23 family members (RT 6755-6818). He interviewed both Drs. Fricke and Wilkinson — the
24 psychologist and psychiatrist who had evaluated petitioner prior to the guilt phase — and
25 reviewed petitioner's treatment in the California Medical Facility (RT 6783-6803). Dr.
26 Ridlehuber's testimony also confirms that he knew about the history of violence, alcoholism
27 and sexual abuse in petitioner's family and about incidents where petitioner's mother believed
28 she attempted to drown petitioner (RT 6760-6812). Dr. Ridlehuber stated that petitioner

1 presented a reliable, complete and detailed picture of himself (RT 6818); Dr. Ridlehuber also
2 noted that he was “compulsive” when evaluating a patient and preferred to have as many
3 sources of information as possible, but never indicated that he felt he did not have adequate
4 information to evaluate petitioner (RT 6755-6798).

5 Petitioner's assertion that earlier retention of Dr. Ridlehuber might have led to a different
6 diagnosis of petitioner is belied by Dr. Ridlehuber's own testimony at trial and the factual
7 record. For example, he declares that “[t]here is now information concerning the Rowland
8 family’s history of violence, alcoholism, and sexual abuse,” (Exh. No. 50 of App. No. 16 at 7),
9 but, as discussed above, the record confirms that Dr. Ridlehuber knew of these conditions and
10 stated that they may have contributed to petitioner’s mental health (RT 6760-61). Dr.
11 Ridlehuber also declares that, had he had additional information, he would have performed
12 additional tests to determine whether petitioner had suffered organic brain damage (Exh. No. 50
13 of App. No. 16 at 4-5. Exh. No. 51 at 6-11). Dr. Ridlehuber testified, however, that he tested
14 petitioner for organic brain damage and found none (RT 6769-96); that he now would like to
15 perform additional tests does not mean counsel’s performance was deficient.

16 Petitioner fails to demonstrate that his counsel were ineffective in preparing for the
17 penalty phase of his trial. As the record reflects and the discussion above confirms, petitioner’s
18 counsel retained Dr. Ridlehuber in addition to other mental health experts, and Dr. Ridlehuber
19 testified extensively on petitioner’s behalf at the penalty phase. Dr. Ridlehuber’s own
20 testimony confirms that his examination of petitioner was thorough and that he was provided
21 with extensive records and information about petitioner’s family background, criminal
22 background, and health history. Dr. Ridlehuber also indicated that his examination of petitioner
23 was extensive and did not state, at the time, that he had been retained too late to conduct an
24 adequate examination and render his professional opinion. Accordingly, this order finds and
25 concludes that petitioner’s trial attorneys fulfilled their duty to seek out background information
26 and provide it to the penalty phase mental health expert. *See Wallace*, 184 F.3d at 1118.

27 This order has concluded that counsel’s investigation of petitioner’s background and
28 counsel’s investigation of petitioner’s mental health status were reasonable under the

1 circumstances and did not constitute deficient performance. As such, this order is not required
2 to conduct a prejudice analysis of those claims. *See, e.g., Siripongs*, 1333 F.3d at 737.
3 Nonetheless, the court finds that, even had counsel's performance been deficient, none of the
4 alleged errors were prejudicial to petitioner's penalty phase defense. Any additional evidence
5 of petitioner's family background appears to be duplicative of that already in Dr. Ridlehuber's
6 possession at the time of trial, since he testified as to violence, alcoholism and sexual abuse in
7 petitioner's family.

8 Moreover, the government's case in aggravation was extremely strong. The jury was
9 presented with evidence showing, for example, that petitioner had been convicted of multiple
10 sexual assault felonies, including sodomy, against a 13-year old girl. Petitioner cannot show
11 that additional testimony from Dr. Ridlehuber regarding his mental diagnoses or his family
12 background would be enough to overcome the strong case in aggravation or, given the
13 circumstances of the crime for which petitioner was convicted, would have persuaded the jury
14 to be lenient. Petitioner has not demonstrated anything that sufficiently undermines the court's
15 confidence in the fairness of the death verdict. *See, e.g., Wong v. Belmontes*, 130 S.Ct. 383, 390
16 (2009) (finding no prejudice where the aggravation evidence was "simply overwhelming");
17 *Rhoades v. Henry*, 596 F.3d 1160, 1195 (9th Cir. 2010) (holding "that [petitioner's] newly
18 proffered facts . . . add too little, and the aggravating circumstances are too strong, to make it
19 reasonably probable that the sentencing decision would have been different but for counsel's
20 performance"). In sum, the order finds and concludes that there was no reasonable probability
21 that, absent counsel's alleged errors, the jury might have imposed a sentence of life without
22 parole instead of death. Accordingly, this claim is denied, petitioner's request for an
23 evidentiary hearing is denied and summary judgment is granted to respondent.

24 **3. CLAIM 3**

25 In Claim 3, petitioner maintains that the jury speculated that, if given a sentence of life
26 without parole ("LWOP"), petitioner might still be released from prison. According to
27 petitioner, the jury considered this as a factor supporting a sentence of death and committed
28 misconduct as a result. This claim was raised in petitioner's first state habeas petition and

1 denied by the California Supreme Court on the merits in a summary opinion.

2 “[W]here a state court’s decision is unaccompanied by an explanation, the habeas
3 petitioner’s burden still must be met by showing there was no reasonable basis for the state
4 court to deny relief.” *Richter*, 131 S. Ct. at 784. Petitioner is unable to meet this burden.

5 Petitioner is unable to cite to any clearly established federal law that would entitle him
6 to relief, and a review of the record does not demonstrate that the state court was objectively
7 unreasonable in denying this claim. Instead, petitioner cites to decisions such as *Furman v.*
8 *Georgia*, 408 U.S. 238 (1972) and *Mattox v. United States*, 146 U.S. 140 (1892) for the general
9 principle that capital juries are precluded from considering outside evidence.

10 These decisions do not support petitioner’s claim that it was reversible misconduct for
11 the jury to allegedly speculate that a sentence of LWOP might mean that petitioner could still be
12 released from prison at some point. While there is no decision directly on point, the Supreme
13 Court has considered the constitutionality of California’s *Briggs* instruction, which informed
14 capital jurors that the state governor could commute or modify a sentence of LWOP, but did not
15 inform capital jurors that a sentence of death could also be commuted or modified. *California*
16 *v. Ramos*, 463 U.S. 992 (1983). The Court upheld the instruction, finding that a jury’s
17 consideration of the commutation power did not undermine the jury’s sentencing responsibility
18 nor “impermissibly inject an element too speculative for the jury’s deliberation;” furthermore,
19 failure to inform the jury of the gubernatorial power to also commute death sentences did not
20 render the instruction unconstitutional. *Ibid.* at 1012-13.

21 Petitioner is correct that a *Briggs* instruction was not given in his case. Nonetheless,
22 *Ramos* is relevant. If the Supreme Court has held that a capital jury may be specifically
23 instructed that it is allowed to consider gubernatorial commutation powers of a LWOP sentence,
24 then petitioner cannot – absent clearly established federal law to the contrary – demonstrate
25 that the jury’s speculation regarding such a possibility is prejudicial error. Petitioner cannot
26 meet the requirements of Section 2254(d), and respondent is entitled to summary judgment on
27 this claim.

28 **4. CLAIM 4**

1 In Claim 4, petitioner alleges that one of his attorneys at trial, Charles Pierpont, had a
2 conflict of interest that was not revealed to petitioner or waived by him. According to
3 petitioner, this conflict violated his rights to conflict-free counsel under the Fifth, Sixth, Eighth
4 and Fourteenth Amendments. This claim was raised in petitioner's first state habeas petition
5 and was denied on the merits by the California Supreme Court.

6 Petitioner alleges that attorney Pierpont knew Detective Mifflin Singleton, a chief
7 investigating officer and testifying witness in the case against petitioner, from his time as a
8 Deputy District Attorney in the San Mateo District Attorney's Office. According to petitioner,
9 Detective Singleton and attorney Pierpont remained friends during the time of petitioner's trial,
10 and attorney Pierpont or his legal partner had represented Detective Singleton in several civil
11 suits, including a divorce action. This relationship was allegedly not revealed to petitioner.
12 Petitioner concedes that Pierpont's representation of Singleton terminated in October 1986,
13 before the commencement of trial in this case; Pierpont did, however, cross-examine Singleton
14 in the preliminary hearing on September 15, 1986. Petitioner maintains that, because Singleton
15 was a social friend and legal client of Pierpont, he had an actual conflict of interest that
16 prejudiced petitioner's defense.

17 The Sixth Amendment's right to conflict-free counsel is violated only if the conflict
18 "adversely affected" trial counsel's performance. *Alberni v. McDaniel*, 458 F.3d 860, 870 (9th
19 Cir. 2006). "[A]n actual conflict of interest mean[s] precisely a conflict that affected counsel's
20 performance – as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535
21 U.S. 162, 171 (2002) (emphasis omitted).

22 A conflict of interest can arise when counsel represents multiple defendants whose
23 interests are hostile to one another. In order to establish a violation of the Sixth Amendment, a
24 petitioner "who raised no objection at trial must demonstrate that an actual conflict of interest
25 adversely affected his lawyer's performance." *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)
26 (footnote omitted); *accord Mickens*, 535 U.S. at 171; *Paradis v. Arave*, 130 F.3d 385, 391 (9th
27 Cir. 1997); *United States v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996); *Sanders*, 21 F.3d at
28 1452. An "actual conflict" is not separate from an "adverse effect;" rather, it is defined as one

1 which adversely affects the lawyer's performance. *Earp v. Ornoski*, 431 F.3d 1158, 1183 (9th
2 Cir. 2005) (quoting *Mickens*, 535 U.S. at 172 n.5).

3 An "actual conflict of interest" only occurs when counsel "actively represented
4 conflicting interests." *Strickland*, 466 U.S. at 692. A theoretical or potential conflict is
5 insufficient to constitute actual conflict; instead counsel must have actively represented
6 conflicting interests. *Cuyler*, 446 U.S. at 350 (holding that "the possibility of conflict is
7 insufficient to impugn a criminal conviction"); *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.
8 2000), *amended*, 253 F.3d 1150 (9th Cir. 2001); *Morris v. California*, 966 F.2d 448, 455 (9th Cir.
9 1991). A petitioner must prove an actual conflict through a factual showing in the record.
10 *Bragg*, 242 F.3d at 1087; *Morris*, 966 F.2d at 455.

11 Petitioner urges a finding of an "actual conflict" and thus a presumption of prejudice
12 based on attorney Pierpont's relationship with Detective Singleton. The Supreme Court,
13 however, has applied the presumption only to multiple-representation cases, such as those cases
14 where attorneys were representing multiple defendants at the same trial or defendants charged
15 with the same murders in separate trials. *See, e.g. Cuyler*, 446 U.S. at 340-50. Petitioner can
16 cite to no Supreme Court cases finding an actual conflict of interest where, as here, defense
17 counsel previously represented a state witness in a civil matter completely unrelated to the
18 criminal matter. Furthermore, petitioner also cannot demonstrate that any alleged conflict
19 "significantly affected counsel's performance." *Mickens*, 533 U.S. at 172-73. As such,
20 petitioner cannot demonstrate that an independent review of the record shows that the
21 California Supreme Court's decision denying this claim was objectively unreasonable under
22 clearly established federal law, or was based on an unreasonable determination of the facts.
23 Summary judgment on this claim must be granted to respondent.

24 **5. CLAIM 5**

25 In Claim 5, petitioner alleges that both of his trial attorneys had an unconstitutional
26 conflict of interest because they were both previously employed by the same district attorney's
27 office that prosecuted petitioner. This claim was raised in petitioner's first state habeas petition
28 and was denied on the merits by the California Supreme Court.

Petitioner maintains that his attorneys, Charles Pierpont and James Courshon, were former Deputy District Attorneys who had worked at the San Mateo District Attorney's Office at the same time as Martin Murray, the Deputy District Attorney responsible for prosecuting petitioner. According to petitioner, we should infer: 1) that his attorneys' previous employment caused his attorneys to view his case from the perspective of a prosecutor and; 2) that his attorneys had a personal relationship with prosecutor Murray that compromised their loyalty to petitioner and adversely impacted their conduct as trial counsel.

This claim is without merit. As discussed *supra*, in order to prevail on a claim of actual conflict of interest, a petitioner must demonstrate that his counsel "actively represented conflicting interests." *Strickland*, 466 U.S. at 692; *Cuyler*, 446 U.S. at 350 (holding that "the possibility of conflict is insufficient to impugn a criminal conviction"). A petitioner also must demonstrate that any alleged conflict "significantly affected counsel's performance." *Mickens*, 533 U.S. at 172-73. This petitioner cannot do. In addition, he cannot cite to any clearly established federal law holding that a defense attorney's prior employment as a prosecutor amounts to a conflict of interest, nor can he show that the state court decision denying this claim was based on an unreasonable determination of the facts. Accordingly, this claim must be denied and summary judgment is granted to respondent.

6. CLAIM 6

In Claim 6, petitioner maintains that he was denied a fair trial, due process of law, the effective assistance of counsel and the right to present a defense when the trial court ruled that if the entirety of petitioner's confession to Susan Lanet was admitted, evidence of petitioner's prior convictions would also be allowed into evidence. A prior order has already held that this claim is procedurally defaulted. *See* Order Granting Motion to Dismiss Claims 6, 8 and 10 As Defaulted, Aug. 15, 2002. Furthermore, another order has previously determined that petitioner cannot show either cause and prejudice or a miscarriage of justice sufficient to overcome the default. *See* Order Regarding Cause and Prejudice, Sept. 14, 2010. Petitioner has submitted nothing additional that would justify reconsideration of any previous decisions. Accordingly, this claim is denied and summary judgment is granted to respondent.

1 **7. CLAIM 7**

2 In Claim 7, petitioner maintains that he was denied effective assistance of counsel at the
3 penalty phase of his trial. Specifically, he maintains that his attorneys should have elicited
4 testimony from Susan Lanet regarding certain of petitioner's statements concerning an
5 argument with the victim. The California Supreme Court denied this claim in a reasoned
6 opinion on direct appeal, as follows:

7 B. *Ineffective Assistance of Counsel*

8 Defendant contends that trial counsel provided him with ineffective
9 assistance under the Sixth Amendment to the United States Constitution by
10 failing to call Susan Lanet as a witness in order to elicit his extrajudicial
statement to the effect that he killed [Geri] after a fight unrelated to sex.

11 To succeed in his claim, defendant must show (1) deficient performance
12 under an objective standard of professional reasonableness and (2) prejudice
under a test of reasonable probability. (E.g., *People v. Ledesma* (1987) 43 Cal
3d 171, 215-18 [parallel citations omitted].)

13 Defendant fails in his attempt. Counsel's performance was not deficient
14 because the omission was not unreasonable. In view of the evidence concerning
15 the circumstances for the present offenses adduced at the guilt phase, counsel
16 could properly have declined to reopen the matter – especially through a self-
serving, out-of-court statement of the defendant. Moreover, even if counsel's
performance has been deficient, it could not have subjected defendant to
prejudice. There is no reasonable probability that the introduction of a statement
of the sort here would have affected the outcome.⁴

17 *Rowland*, 4 Cal. 4th at 273-74.

18 Petitioner cannot demonstrate that anything in the state court's reasoned opinion
19 denying this claim is contrary to, or an unreasonable application of, clearly established United
20 States Supreme Court law. Nor can he show that the opinion was based on an unreasonable
21 determination of the facts. As the state court concluded, counsel's performance was not
22 deficient because it was not unreasonable for counsel to decide not to elicit this testimony from
23 Lanet. *See Strickland*, 466 U.S. at 687-688. Petitioner cannot show that testimony from Lanet
24

25
26 ⁴ [Opinion Footnote 15] Defendant claims that trial counsel's ineffective assistance
27 under the Sixth Amendment entailed the violation of various provisions of the United States
28 Constitution, including the due process clauses of the Fifth and Fourteenth Amendments; the
trial clause of the Sixth Amendment; and the cruel and unusual punishments clause of the
Eighth Amendment. But as shown, counsel's assistance was *not* ineffective.

that petitioner killed Geri after a fight, but that the fight was unrelated to sex, would have been helpful to his defense. In addition, even if petitioner had been able to show that counsel's behavior was deficient in this regard, he is unable to demonstrate prejudice. There is no reasonable probability that had this testimony been elicited, the jury would have been more likely to return a verdict of life without parole instead of death. *Strickland*, 466 U.S. at 694. Accordingly, this claim must be denied and summary judgment is granted to respondent. Petitioner's request for an evidentiary hearing on this claim is also denied.

8. CLAIM 8

In Claim 8, petitioner maintains that his due process and confrontation clause rights were violated by evidence of certain of the victim's statements. A prior order has already held that this claim is procedurally defaulted. *See* Order Granting Motion to Dismiss Claims 6, 8 and 10 As Defaulted, Aug. 15, 2002. Furthermore, a prior order has previously determined that petitioner cannot show either cause and prejudice or a miscarriage of justice sufficient to overcome the default. *See* Order Regarding Cause and Prejudice, Sept. 14, 2010. Petitioner has submitted nothing additional that would justify reconsideration of any previous decisions. Accordingly, this claim is denied and summary judgment is granted to respondent.

9. CLAIM 9

In Claim 9, petitioner maintains that there was insufficient evidence to support both the rape conviction and the special circumstance of murder during the commission of rape. The California Supreme Court denied this claim in a reasoned decision on direct appeal, as follows:

E. Sufficiency of the Evidence for the Rape Conviction

Defendant contends that the evidence is insufficient to support his conviction for rape.

In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [parallel citations omitted].) To our mind, we must ask the same questions when we conduct such review under the due process clause of article I, section 15 of the California Constitution.

A state court conviction that is not supported by sufficient evidence

violates the due process clause of the Fourteenth Amendment and is invalid for that reason. (*Jackson v. Virginia, supra*, 445 U.S. at pp. 313-324 [parallel citations omitted].) In our view, a California conviction without adequate support separately and independently offends, and falls under, the due process clause of article 1, section 5.

Defendant's claim is to the following effect: although the evidence is sufficient to prove that he engaged in sexual intercourse with [Geri], it is insufficient to prove that he did so while she was alive *or* without her consent.

Of course, in rape the act of sexual intercourse must involve a live victim. (*People v. Kelly* (1992) 1 Cal. 4th 495, 524 [parallel citations omitted]) who does not effectively consent (see Penal Code, § 261).

The evidence is more than sufficient on each point. To support our conclusion, we need cite only this. There was expert testimony that before death, [Geri] suffered a bruise "an inch or two above the [right] kneecap and somewhat towards the inside part of the thigh"; the location of the injury was "unusual"; such a bruise, however, could have been caused "if someone used a knee . . . to force the legs apart." Relying on that testimony, as it would plainly have been entitled to, a rational trier of fact would surely have found beyond a reasonable doubt that at the time defendant engaged in sexual intercourse, [Geri] was alive *and* did not consent.

Defendant argues to the contrary. His words establish nothing more than that some rational trier of fact might have made a different finding. That is not enough.⁵

Rowland, 4 Cal. 4th at 269-70.

The rejection of this claim by the state court was neither contrary to nor an unreasonable application of clearly established United States Supreme Court authority. In addition, the state court's decision was not based on an unreasonable determination of the facts. In his opposition to respondent's motion, petitioner does little more than cite to *Jackson v. Virginia*, 443 U.S. 307 (1979), the controlling decision regarding this issue and the decision relied upon by the California Supreme Court. He does not cite to any controlling authority demonstrating that the state court's decision was unreasonable, nor does he cite to any evidence in the record indicating that the state court relied on an unreasonable determination of the facts. To the contrary, as the California Supreme Court demonstrated, there was more than sufficient

⁵ [Opinion Footnote 8] Defendant claims that his rape conviction, [if] based on evidence that is insufficient for the due process clause of the Fourteenth Amendment, is invalid not only under the federal constitutional provision but under others as well – including some unspecified clause of the Sixth Amendment and, perhaps, the cruel and unusual punishments clause of the Eighth Amendment. The conviction is *not* based on insufficient evidence.

evidence for a rational trier of fact to conclude both that Geri was alive at the time of intercourse and that she did not consent. *Rowland*, 4 Cal. 4th at 270. Accordingly, petitioner cannot meet his burden under Section 2254(d), and respondent is entitled to summary judgment on this claim.

10. CLAIM 10

In Claim 10, petitioner maintains that he was denied effective assistance of counsel when his counsel failed to object to evidence regarding future conditions of confinement. The court has already held that this claim is procedurally defaulted. *See* Order Granting Motion to Dismiss Claims 6, 8 and 10 As Defaulted, Aug. 15, 2002. Furthermore, the court has previously determined that petitioner cannot show either cause and prejudice or a miscarriage of justice sufficient to overcome the default. *See* Order Regarding Cause and Prejudice, Sept. 14, 2010. Petitioner has submitted nothing additional that would justify the reconsideration of any previous decisions. Accordingly, this claim is denied.

11. CLAIM 11

In Claim 11, petitioner maintains that alleged misconduct of the prosecutor during closing argument violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Specifically, petitioner contends that the prosecutor improperly expressed his personal opinion regarding the appropriateness of the death penalty. This claim was denied by the California Supreme Court in a reasoned opinion on direct appeal, as follows:

Seventh, defendant complains of the concluding comments in the prosecutor's summation.

"... And I've made a long practice in my life never to ask others to do what I would not feel is right, and what I would not do myself.

"I believe strongly in the sanctity of human life, and I would not ask you to do something that I would not do. And I believe in human life. But I also believe that society has the right, in fact the duty to protect itself and to see that justice is done in the appropriate cases.

"And based in the system of justice where the punishment should fit the crime and the criminal, based on the law in this case . . . , based on the savagery, and the brutality, and the horror of the crime against [Geri], based on his history of past criminal activity involving violence which represents a man of extreme cruelty, depravity, and violence, I now stand before you, and with a full realization of the awesome responsibility that's been entrusted to you and to me,

1 and with a full realization of the gravity and the enormity of what I am about to
2 ask you, without reservation, without hesitation, I am asking that you return a
verdict of death.”

3 Outside the presence of the jury, defense counsel requested the court “to
4 instruct the jury on one comment made by [the prosecutor]. And that went to his
personal opinion in this matter concerning the sentence of death. I think that’s
5 improper under the cases. And I would ask the court to admonish the jury that
they should not consider [the prosecutor’s] personal feelings in arriving at the
6 appropriate penalty.”

7 The court refused. “I think the prohibition goes to personal belief in
evidence, evidence not before the jury. And he very carefully didn’t do that. I
8 know of no rule of law to support the action you’re requesting. I think it’s an
appropriate argument. He very carefully didn’t imply that he knows something
9 that the jury doesn’t know. I think it’s an appropriate argument.

10 We agree. True, a prosecutor may not “state his personal belief regarding
the appropriateness of the death penalty, *based on facts not in evidence*.”
11 (*People v. Ghent* (1987) 43 Cal. 3d 739, 772 [parallel citations omitted]. But he
may make a statement of this sort if, as here, it is “based solely on the facts of
12 record.” (*Ibid.*) There is no reasonable likelihood that the jury understood the
words otherwise. Of course, “prosecutors should refrain from expressing
13 personal views which might unduly inflame the jury against the defendant.”
(*Ibid.*) The views expressed by the prosecutor in this case were not such.⁶

14 *Rowland*, 4 Cal. 4th at 280-81.

15 Respondent moves for summary judgment on Claim 11 on the grounds that, as detailed
16 above, the California Supreme Court reasonably considered and rejected petitioner’s
17 contentions on the merits, thus foreclosing relief under 28 U.S.C. 2254(d). Respondent also
18 asserts that the state court’s findings of facts are entitled to deference pursuant to 28 U.S.C.
19 2254(e)(1).

20 Although this Court disapproves of the comments by counsel (by injecting his personal
21 views before the jury), respondent is correct on the standard. Petitioner is unable to cite to any
22 clearly established federal law demonstrating that the state’s court’s conclusions were
23

24 ⁶ [Opinion Footnote 19] Defendant generally claims that defense counsel provided
25 ineffective assistance in violation of the Sixth Amendment by failing to object to the various
instances of “misconduct.” . . . Further, he generally claims that the court committed error
26 apparently under California law by neglecting to prevent or cure the “harm” arising
therefrom *ex proprio motu*. . . . There was no impropriety.

27 Defendant also claims that the various instances of “misconduct” entailed the
28 violation of both California law and the United States Constitution. Again, there was no
impropriety.

1 unreasonable. The Supreme Court has held that when reviewing a habeas claim of prosecutorial
2 misconduct, the relevant inquiry is not whether “the prosecutor’s remarks were undesirable or
3 even universally condemned.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citations
4 omitted). Rather, the issue “is whether the prosecutors’ comments ‘so infected the trial with
5 unfairness as to make the resulting conviction a denial of due process.’” *Id.* (citing *Donnelly v.*
6 *DeChristoforo*, 416 U.S. 637 (1974)).

7 Here, as the trial court held and the California Supreme Court confirmed, the
8 prosecutor’s statements were based on evidence in the record. Petitioner can cite to nothing
9 indicating the statements were constitutionally improper under Supreme Court decisions, let
10 alone that they “so infected the trial with unfairness as to make the resulting conviction a
11 denial of due process.” *Darden*, 477 U.S. at 181 (citing *Donnelly*, 416 U.S. at 637).
12 Furthermore, none of the decisions cited by petitioner support his claim of prosecutorial
13 misconduct here. In *United States v. Young*, for example, the Supreme Court found that even
14 though certain remarks by the prosecutor were inappropriate, they did not serve to “undermine
15 the fundamental fairness of the trial and contribute to a miscarriage of justice” and thus did not
16 require reversal. 470 U.S. 1, 16, 19 (1985). In *Berger v. United States*, 295 U.S. 78 (1935), the
17 Supreme Court found that certain statements made by the prosecutor constituted error because
18 they referred to personal knowledge of the prosecuting attorney, in direct contrast to the instant
19 case where the prosecutor’s remarks were based on record evidence. As such, respondent is
20 entitled to summary judgment on Claim 11.

21 **12. CLAIM 12**

22 In Claim 12, petitioner maintains: (1) that the prosecutor’s remarks regarding the
23 personal responsibility of the jury amounted to prosecutorial misconduct; and(2) that his
24 counsel’s failure to object to the remarks was ineffective assistance under the Sixth
25 Amendment. The California Supreme Court addressed both prongs of this claim in a reasoned
26 opinion on direct appeal, as follows:

27 Second, defendant complains of certain unobjected-to comments in the
28 prosecutor’s summation that allegedly misled the jury on its role in determining
penalty.

1 In context, the message the prosecutor delivered was this: the jurors'
2 function was judicial, not legislative; they had to decide whether the death
3 penalty was the appropriate punishment in this case, not whether it should be
4 available as a sanction in general. That message, of course, was altogether
5 sound.

6 We do not overlook – and certainly do not approve – remarks such as
7 this: “We had a recent election in which several of our Supreme Court justices
8 were perceived by the voters not to be applying [the death penalty] law. They
9 are gone now. There’s no question that it is the policy expressed by the will of
10 the populace that there be a death penalty in California, and that it be carried out
11 in appropriate cases.” Or this: “[T]he voters overwhelmingly approved the death
12 penalty. . . .”

13 Nevertheless, there is no reasonable likelihood that the jury understood
14 the challenged remarks as defendant asserts – and surely not in the way as to
15 “minimize [its] sense of responsibility for determining the appropriateness of
16 death” in violation of the Eighth Amendment to the United States Constitution as
17 construed in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [parallel citations
18 omitted]. . . .⁷

19 *Rowland*, 4 Cal. 4th at 276, 281.

20 Petitioner has failed to demonstrate that the state court decision was contrary to, or
21 involved an unreasonable application of, clearly established law as determined by the United
22 States Supreme Court. *See* 28 U.S.C. 2254(d). Nor has petitioner demonstrated that the state
23 court decision relied on an unreasonable determination of the facts. As detailed *supra*,
24 prosecutorial remarks, even if they were “undesirable” or “universally condemned,” do not rise
25 to the level of reversible error unless they “so infected the trial with unfairness as to make the
26 resulting conviction a denial of due process.” *Darden*, 477 U.S. at 181 (citing *Donnelly*, 416
27 U.S. at 637). Petitioner argues that, under *Caldwell*, 472 U.S. at 341, the prosecutor’s comments
28 alleviated the jurors of their individual responsibility for imposing a death sentence, violating
the Eighth Amendment and resulting in reversible error. The California Supreme Court
squarely addressed *Caldwell*, however, and found that, taken as a whole, the prosecutor’s
argument did not mislead the jurors regarding their discretion in sentencing petitioner.

⁷ [Opinion Footnote 19] Defendant generally claims that defense counsel provided ineffective assistance in violation of the Sixth Amendment by failing to object to the various instances of [prosecutorial] “misconduct.” . . . Further, he generally claims that the court committed error by neglecting to prevent or cure the “harm” arising therefrom *ex proprio motu*. . . . There was no impropriety.

1 *Rowland*, 4 Cal. 4th at 276. Rather, taken in context, the prosecutor's argument was an
2 "altogether sound" message to the jury that its function was to decide whether the death penalty
3 or LWOP was the appropriate penalty in petitioner's case. *Ibid*.

4 Petitioner also cannot demonstrate that the state court's decision finding that there was
5 no ineffective assistance of counsel was contrary to, or involved an unreasonable application of,
6 clearly established federal law, or that it relied on an unreasonable determination of the facts.
7 The decision of petitioner's counsel not to object to the prosecutor's statements was not
8 constitutionally deficient. As this court has already concluded, the state court was not
9 unreasonable in finding that the prosecutor's comments did not rise to the level of misconduct.
10 Given that there was no misconduct, any objection to the comments by petitioner's trial counsel
11 would likely have been overruled. *Strickland* and its progeny do not require that trial counsel
12 make futile objections, and, thus, the decision of petitioner's counsel was reasonable under
13 these circumstances. *See Sanders*, 21 F.3d at 1456.

14 Furthermore, petitioner cannot demonstrate that he suffered any prejudice due to his
15 counsel's failure to object to the jury instruction. Given that any objection would have been
16 futile, there is no reasonable probability that, had the objection been made, the result of the
17 proceeding would have been different. *Strickland*, 466 U.S. at 693-94. Accordingly,
18 petitioner's claim must be denied and summary judgment granted to respondent.

19 **13. CLAIM 13**

20 In Claim 13, petitioner maintains: (1) that the prosecutor's remarks regarding the
21 credibility of petitioner's mental health expert amounted to prosecutorial misconduct; and (2)
22 that his counsel's failure to object to the remarks was ineffective assistance under the Sixth
23 Amendment.

24 Prior orders have already found that petitioner's claim of prosecutorial misconduct is
25 procedurally defaulted, and that petitioner is unable to demonstrate cause and prejudice
26 sufficient to overcome the default (Docs. 163 and 252). Accordingly, respondent is entitled to
27 summary judgment on this portion of Claim 13.

28 Respondent is also entitled to summary judgment on the portion of Claim 13 alleging

1 ineffective assistance of counsel based on the failure to object to the prosecutor's statements.

2 To begin with, there is no merit to petitioner's claim of prosecutorial misconduct. The
3 prosecutor's remarks did not render the trial fundamentally unfair. *Darden*, 477 U.S. at 181.

4 As noted by the California Supreme Court, the comments in question, though "harsh and
5 unbecoming," constituted reasonable inferences from the evidence. *Rowland*, 4 Cal. 4th at 277.

6 As the state court reasonably found:

7 For instance, Dr. Ridlehuber [petitioner's expert mental health witness]
8 himself admitted that "psychiatry is not an exact science"; that psychiatrists rely
9 on what they are told by their patients, who sometimes lie; that "two equally
10 competent psychiatrists can conduct an examination on an individual and come
11 to different conclusions"; and that psychiatrists "can be fooled, and I've been
12 fooled." Also, as noted, there was evidence showing defendant's interest in
13 psychology and suggesting manipulation on his part.

14 ...

15 In the challenged remarks, the prosecutor did not substantially misstate
16 facts or go beyond the record.

17 *Rowland*, 4 Cal. 4th at 277. Because there was no reversible misconduct on the part of the
18 prosecutor, it was not deficient performance for petitioner's counsel to fail to object. *Strickland*
19 and its progeny do not require that trial counsel make futile objections, and, thus, the decision
20 of petitioner's counsel was reasonable under these circumstances. *See Sanders*, 21 F.3d at
21 1456; *see also, Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (finding that a challenge
22 to a futile objection fails both prongs of *Strickland*). Furthermore, Petitioner cannot
23 demonstrate that he suffered any prejudice due to his counsel's failure to object to the jury
24 instruction. Given that any objection would have been futile, there is no reasonable probability
25 that, had the objection been made, the result of the proceeding would have been different.
26 *Strickland*, 466 U.S. at 693-94. Accordingly, petitioner's claim must be denied, and respondent
27 is entitled to summary judgment on Claim 13 in its entirety.

28 **14. CLAIM 14**

 In Claim 14, petitioner maintains: 1) that the prosecutor's remarks regarding testimony
of petitioner's relatives amounted to prosecutorial misconduct; and 2) that his counsel's failure
to object to the remarks was ineffective assistance under the Sixth Amendment.

1 As with Claim 13, previous orders have found that the prosecutorial misconduct prong
2 of this claim is procedurally defaulted, and that petitioner is unable to demonstrate cause and
3 prejudice sufficient to overcome the default (Docs. 163 and 252). Accordingly, respondent is
4 entitled to summary judgment on this portion of Claim 14.

5 Respondent is also entitled to summary judgment on the portion of Claim 14 alleging
6 ineffective assistance of counsel based on the failure to object to the prosecutor's statements.
7 To begin with, there is no merit to petitioner's underlying claim of prosecutorial misconduct. In
8 addition to dismissing this claim on procedural grounds, the California Supreme Court
9 reasonably found that it lacked merit, as follows:

10 Fifth, defendant complains of the following unobjected-to comment in
11 the prosecutor's summation: "And his mother – I think his mother understands
12 justice to some extent. Because when asked about anything she wanted to tell
13 you, she really couldn't bring herself to tell you that he didn't deserve the death
14 penalty based on the evidence that you had before you. Instead, what she said
15 was her religion says that there shouldn't be a death penalty."

16 The challenged remark constituted a fair comment on the evidence.
17 There is no reasonable likelihood that the jury would have understood the works
18 otherwise.

19 Sixth, defendant complains of unobjected to comments in the
20 prosecutor's summation to the effect that in determining penalty, the jury could
21 consider evidence bearing on defendant's background but not his family's.

22 The defendant's background is, of course, material to penalty. That is
23 true under California law [citations omitted] and the United States Constitution
24 (see, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [subsequent citations
25 omitted]). The conclusion follows from the proposition that "the sentencer . . .
26 [may] not be precluded from considering, *as a mitigating factor*, any aspect of a
27 defendant's character or record . . . that the defendant proffers as a basis for a
28 sentence less than death." (*Lockett v. Ohio*, *supra*, at p. 604 [additional citations
omitted].)

By contrast, the background of the *defendant's family* is of no
consequence in and of itself. That is because under both California law . . . and
the United States Constitution . . . , the determination of punishment in a capital
case turns on the defendant's personal moral culpability. It is the "*defendant's*
character and record" that "the sentence . . . [may] not be precluded from
considering" – not his *family's*. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604
[additional citations omitted]).

To be sure, the background of the defendant's family is material if, and to
the extent that, it relates to the background of defendant himself. But that very
point emerges from the challenged remarks. For example, the prosecutor stated:
"Again, think back and decide how much of this extremely emotional and
painful testimony you heard about Guy Rowland's family applies to him rather

than other people. The things that don't apply to him are not things you can consider in determining whether or not Guy Rowland is entitled to sympathy." Thus – the prosecutor declared expressly – the background of defendant's family does not matter if it does not touch his own. But – he implied – family background does count if it involves defendant himself. There is no reasonable likelihood that the jury understood the words otherwise.⁸

Rowland, 4 Cal. 4th at 278-80.

Petitioner cannot demonstrate that the state court's reasoned decision was contrary to, or an unreasonable application of, clearly established United States Supreme Court law, or based on an unreasonable determination of the facts. The state court addressed the controlling state and federal law and reasonably found that petitioner's claim lacked merit. A failure to object cannot be deficient performance or prejudicial under *Strickland* when there is no reasonable likelihood that the objection was meritorious. *See, e.g.* Sanders, 21 F.3d at 1456 (*Strickland* does not require that trial counsel make futile objections); *see also, Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (finding that ineffective assistance of counsel claim based on defaulted Fourth Amendment claim required a showing that underlying Fourth Amendment claim was meritorious). Given that any objection here would have been futile, there is no reasonable probability that, had the objection been made, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693-94. Accordingly, petitioner's claim must be denied, and respondent is entitled to summary judgment on Claim 14 in its entirety.

15. CLAIM 15

In Claim 15, petitioner maintains that certain aspects of the California death penalty statutes are unconstitutional under the Fifth, Sixth and Eighth Amendments. Specifically, he argues that the penalty phase jury instructions are deficient because they do not designate mitigating and aggravating factors, that the applicable statutes do not require proof beyond a reasonable doubt that aggravating factors have been proven and that the aggravating factors outweigh the mitigating factors, that the statutes do not require written findings as to the

⁸ [Opinion Footnote 18] Defendant claims that defense counsel provided ineffective assistance in violation of the Sixth Amendment by failing to object to the "misconduct." He also claims that the court committed error apparently under California law by neglecting to prevent or cure the harm arising therefrom *ex proprio motu*. There was no impropriety.

aggravating factors relied upon by the jury, and that there is no procedure utilized by the trial court regarding the jury's findings that allows meaningful review by other courts. The California Supreme Court addressed this claim in a reasoned opinion on direct appeal, as follows:

E. *Constitutionality of the 1978 Death Penalty Law*

Defendant contends that the 1978 death penalty law is facially invalid under the United States and California Constitutions, and hence that the judgment entered pursuant thereto is unsupported as a matter of law. "[A]s a general matter at least, the 1978 death penalty law is facially valid under the federal and state charters. In his argument here, defendant raises certain specific constitutional challenges. But . . . in the . . . series of cases [beginning with *People v. Rodriguez* (1986) 42 Cal. 3d at pp. 1009-1010 [parallel citations omitted], we have rejected each and every one. We see no need to rehearse or revisit our holdings or their underlying reasoning." (*People v. Ashmus*, *supra*, 54 Cal. 3d at pp. 1009-1010, accord, *People v. Clair*, *supra*, 2 Cal. 4th at p. 691.)⁹

Rowland, 4 Cal. 4th at 283.

Petitioner cannot show that the state court's reasoned opinion is contrary to, or an unreasonable application of, clearly established United States Supreme Court law. Petitioner also fails to demonstrate that the state court's opinion relied on an unreasonable determination of the facts. Tellingly, petitioner does not — and cannot — cite a single decision in support of his argument that the California death penalty statutes are unconstitutional under federal law. Without any citation to mandatory or persuasive authority in support of his argument, petitioner cannot demonstrate that the state court's denial of this claim was objectively unreasonable.

Indeed, the state court's reasoned decision was consonant with clearly established federal law. For example, petitioner alleges that the penalty phase jury instructions are deficient

⁹ [Opinion Footnote 22] We declare that "Whether or not expressly discussed, we have considered and rejected . . . all of the assignments of error presented in all of defendant's briefs." (*People v. Sully* (1991) 53 Cal. 3d 1195, 1252 [parallel citations omitted].)

Having reviewed the record in its entirety, we conclude that the jury found that defendant actually killed, *and* intended to kill, [Geri] within the meaning of *Enmund v. Florida*, *supra*, 458 U.S. 782, 788-801 [parallel citations omitted]. We also conclude that these findings are amply supported and adopt them as our own. Accordingly, we hold that imposition of penalty of death on defendant does not violate the Eighth Amendment to the United States Constitution. (See *Cabana v. Bullock* (1986) 474 U.S. 376 [parallel citations omitted].)

1 because they do not designate mitigating and aggravating factors. In *Tuilaepa v. California*,
2 however, the United States Supreme Court held that giving a penalty phase jury a unitary list of
3 sentencing factors that does not designate which factors are mitigating and which are
4 aggravating does not violate the Constitution. 512 U.S. 967, 978-79 (1994). Moreover, our
5 Court of Appeals has found that California's "death penalty statute's failure to label aggravating
6 and mitigating factors is constitutional." *Williams v. Calderon*, 52 F.3d 1465, 1484 (9th Cir.
7 1995) (citations omitted).

8 Because petitioner cannot meet his burden under Section 2254(d) of showing that the
9 state court's decision was unreasonable, respondent is entitled to summary judgment on Claim
10 15.

11 **16. CLAIM 16**

12 In Claim 16, petitioner maintains that his trial counsel's allegedly confusing and
13 contradictory guilt phase closing argument amounted to ineffective assistance of counsel. This
14 claim was raised in petitioner's second state habeas petition and was denied in a summary
15 decision on the merits and as untimely.

16 An independent review of the record reveals that the state court decision with respect to
17 this claim was not objectively unreasonable. In support of his argument that counsel's
18 statements during closing argument amounted to ineffective assistance, petitioner cites to
19 counsel's references to petitioner's drug use (RT 6071). Petitioner concedes that facts
20 regarding petitioner's drug use were admitted during trial and recognizes that reference to them
21 were part of his counsel's "apparent attempt to persuade the jury that because of the deleterious
22 effects of using methamphetamine petitioner did not form the requisite intent to commit first
23 degree murder." Third Amended Petition at ¶ 265. Petitioner nonetheless argues that
24 subsequent statements by counsel undermined counsel's effort to raise a reasonable doubt
25 regarding petitioner's culpability by stating, *inter alia*, that drugs did not forgive petitioner's
26 conduct, which petitioner's attorney also described as "criminal" (RT at 6082-83). According
27 to petitioner, his counsel's statements amounted to a concession of guilt and an abandonment of
28 any viable theory of defense. Respondent counters that counsel — because of the

1 overwhelming evidence at trial that the victim was in fact killed during her time with petitioner
2 — was reasonably focused on lessening petitioner’s culpability by arguing that a drug-induced
3 fight occurred after consensual sex and that, during the fight, the victim was killed. According
4 to respondent, because petitioner cannot establish that his counsel’s decision was unreasonable,
5 he cannot meet his burden under Section 2254(d).

6 Respondent is correct. To prevail on the merits of this claim, petitioner would need to
7 establish that counsel’s conduct so undermined the proper functioning of the adversarial process
8 that the trial cannot be relied upon as having produced a just result. *Strickland*, 466 U.S. at 686.
9 This he cannot do. A reviewing court must be particularly deferential to counsel’s tactical
10 decisions in closing presentation because of the broad range of legitimate defense strategy at
11 that time. See, e.g., *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (*per curiam*) (counsel’s
12 exclusion of some issues in closing did not amount to professional error of constitutional
13 magnitude where issues omitted were not so clearly more persuasive than those raised); *Davis v.*
14 *Woodford*, 384 F.3d 628, 650-51 (9th Cir. 2004).

15 In *United States v. Fredman*, 390 F.3d 1153, 1157-58 (9th Cir. 2004), for example, our
16 Court of Appeals concluded that counsel’s decision during closing argument to concede certain
17 facts and “admit to some crimes” was a reasonable tactic “to avoid diminishing [counsel’s]
18 credibility by arguing a lost cause.” In petitioner’s case, similarly, the killing itself was not
19 realistically in dispute after the facts had been established at trial. Thus, counsel’s decision to
20 focus on lessening petitioner’s culpability by arguing that while petitioner’s behavior may have
21 been criminal, he did not have the requisite intent needed for a verdict of first-degree murder,
22 was reasonable. Because petitioner cannot demonstrate that counsel’s conduct during closing
23 argument amounted to deficient performance or resulted in prejudice, *Strickland*, 466 U.S. at
24 688, this claim must be denied. Summary judgment is granted to respondent.

25 **17. CLAIM 17**

26 In Claim 17, petitioner maintains that it was ineffective assistance for his trial counsel
27 not to investigate or present expert testimony regarding petitioner’s alleged voluntary
28 intoxication via ingestion of methamphetamine. This claim was raised in petitioner's second

1 state habeas petition and was denied in a summary decision on the merits by the California
2 Supreme Court.

3 Petitioner cannot demonstrate that the state court's rejection of this claim was
4 objectively unreasonable under clearly established federal law; nor can he show that the denial
5 was based on an unreasonable determination of the facts. As discussed above, the Sixth
6 Amendment guarantees the right to effective assistance of counsel. *Strickland*, 466 U.S. at 686.
7 To prevail on a claim of ineffective assistance of counsel, petitioner must show both that
8 counsel's performance was deficient and that the deficient performance prejudiced petitioner's
9 defense. *Ibid.* at 688. A court need not determine whether counsel's performance was deficient
10 before examining the prejudice suffered by the defendant as the result of the alleged
11 deficiencies. *Ibid.* at 697; *Williams*, 52 F.3d at 1470 & n.3 (approving district court's refusal to
12 consider whether counsel's conduct was deficient after determining that petitioner could not
13 establish prejudice).

14 Here, petitioner cannot demonstrate that, even if it was deficient performance for
15 petitioner's counsel not to present expert evidence regarding his alleged methamphetamine use,
16 there was any resultant prejudice under *Strickland*. Perhaps most critically, "juries are unlikely
17 to favor defenses based on abuse of dangerous drugs in evaluating a defendant's culpability for
18 violent behavior." *Mayfield*, 270 F.3d at 931 n.17. It is very doubtful that any juror would have
19 found that petitioner's voluntary intoxication rendered him any less culpable at the guilt phase,
20 and petitioner cannot cite to any evidence or caselaw to the contrary.

21 It is similarly unlikely that any juror would have found petitioner's voluntary
22 intoxication to be a mitigating factor supporting a sentence of LWOP instead of death.
23 Petitioner does not demonstrate how such evidence would have been mitigating during the
24 penalty phase; additionally, the Supreme Court and other courts have repeatedly found that the
25 egregious nature of a defendant's offenses may overcome any alleged prejudice resulting from
26 counsel's failure to introduce mitigating evidence. *See, e.g. Strickland*. 466 U.S. at 700;
27 *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033, 1042 (9th Cir. 1997). Here, in addition to the violent
28 circumstances of the crimes of conviction, the prosecution offered in aggravation evidence of

1 other violent crimes perpetrated by petitioner and his prior felony convictions. *Rowland*, 4 Cal.
2 4th at 353. Given the significant aggravating circumstances, petitioner cannot reasonably argue
3 that introduction of evidence regarding his voluntary intoxication would have led to a different
4 result at the penalty phase. Because he cannot establish prejudice as a result of his counsel's
5 alleged deficient performance, petitioner's ineffective assistance claim must fail and summary
6 judgment is granted to respondent.

7 **18. CLAIM 18**

8 In Claim 18, petitioner alleges that it was ineffective assistance for his counsel not to
9 introduce the entirety of petitioner's confession to Susan Lanet during the guilt phase of his
10 trial. This claim was raised in petitioner's second state habeas petition and denied as untimely
11 and on the merits in a summary opinion by the California Supreme Court.

12 Lanet was a key prosecution witness who testified during the guilt phase regarding
13 petitioner's confession to her that he killed the victim. The trial court held that Lanet was not
14 permitted to disclose any facts during her testimony relating to petitioner's prior convictions.
15 After a motion by petitioner's counsel, however, the trial court also held that admission of
16 Lanet's statements that petitioner had never mentioned any sexual motive for the fight — but
17 rather had told Lanet he killed Geri during a fight over drugs fueled by Geri's derogatory
18 statements to petitioner about ex-convicts — would open the door to admission of proof of
19 petitioner's prior convictions for rape and other crimes (RT 5847-51). As a result, petitioner's
20 counsel opted not to question Lanet regarding petitioner's statements to her that he killed the
21 victim after a fight relating to drugs. According to petitioner, his trial counsel ought to have
22 questioned Lanet regarding the statements petitioner made about the reason for the killing,
23 because it would have assisted in his defense argument that he did not have the requisite intent
24 to kill for first degree murder and that he did not commit rape. Petitioner argues this evidence
25 was so important to his defense that his counsel should have elicited it even though it would
26 have meant admission of petitioner's prior convictions. According to petitioner, the state court
27 was unreasonable when it decided otherwise.

28 Petitioner is incorrect. To prevail on a claim of ineffective assistance of counsel,

petitioner must show both that counsel's performance was deficient and that the deficient performance prejudiced petitioner's defense. *Strickland*, 466 U.S. at 688. Given the egregious and prejudicial nature of petitioner's prior convictions (including oral copulation, sodomy, and lewd acts on a child), it was reasonable for his counsel to conclude that it was preferable to keep evidence of his prior convictions out of the record, even if it meant foregoing testimony by Lanet that the killing occurred in a fight over drugs. This is particularly true given that testimony in question was a self-serving statement by petitioner that was supported by no other evidence. *See, e.g., Brodit*, 350 F.3d at 994 (holding that state court reasonably concluded that trial attorney provided effective assistance of counsel where attorney declined to present evidence favorable to defense out of concern that it would open door to unfavorable evidence). Because petitioner cannot demonstrate either that his counsel's conduct regarding Lanet's testimony amounted to deficient performance or that it resulted in prejudice, *Strickland*, 466 U.S. at 688, this claim must be denied and summary judgment granted to respondent.

19. CLAIM 19

In Claim 19, petitioner alleges that the jurors received extrajudicial information about LWOP and erroneously based their sentence of death on that information. Specifically, petitioner alleges that the jurors received information that even if petitioner was sentenced to LWOP, he could still be released from prison via, for example, commutation or pardon. This claim is closely related to Claim 3, *supra*, except that this claim includes the allegation that a juror received the information from an outside source and then repeated it during deliberations. This claim was raised in petitioner's first state habeas petition and denied on the merits in a summary opinion by the California Supreme Court.

An independent review of the record reveals that the California Supreme Court's summary decision denying relief on this claim was not objectively unreasonable. As our Court of Appeal has stated, we must "focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." *Greene*, 288 F.3d at 1089 (citations omitted). Petitioner cannot cite to any United States Supreme Court authority suggesting that a jury's brief discussion of views regarding the

1 impact of various sentences is reversible error, and “[a] state court cannot possibly have
2 contravened, or even unreasonably applied, ‘clearly established Federal law, as determined by
3 the Supreme Court of the United States,’ by rejecting a type of claim that the Supreme Court
4 has not once accepted as valid.” *In re Davis*, 130 S.Ct. 1, 3 (2009).

5 Here, petitioner supports his claim by citing to several juror declarations, declarations
6 that were also submitted to the California Supreme Court. As a threshold matter, petitioner has
7 not established that the information contained in the declarations is even admissible. There is a
8 “weighty government interest in insulating the jury’s deliberative process,” *Tanner v. United*
9 *States*, 483 U.S. 107, 120 (1987), and thus Fed. R. Evid. 606(b)(1) limits the admission of
10 testimony from a juror regarding “any statement made or incident that occurred during the
11 jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s
12 mental process concerning the verdict or indictment.” Furthermore, a court reviewing the
13 validity of a verdict “may not receive a juror’s affidavit or evidence of a juror’s statement on
14 these matters.” *Ibid*.

15 A juror may testify if, *inter alia*, “extraneous prejudicial information was improperly
16 brought to the jury’s attention,” Fed. R. Evid. 606(b)(2), but this petitioner cannot establish. To
17 begin with, as respondent points out and as petitioner concedes, the jury declarations contain no
18 allegations of outside information actually being presented to the jury; instead, they include
19 individual jurors’ opinions on the matter and allegations that the impact of an LWOP sentence
20 was discussed.

21 More importantly, petitioner cannot establish that information regarding whether a
22 defendant sentenced to LWOP might nonetheless be released under certain circumstances is
23 prejudicial. A petitioner is entitled to habeas relief only if it can be established that the
24 exposure to extrinsic evidence had “substantial and injurious effect or influence in determining
25 the jury’s verdict.” *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000) (quoting *Brecht*, 507
26 U.S. at 623); see *Jeffries v. Blodgett*, 5 F.3d 1180, 1190 (9th Cir. 1993) (same). In other words,
27 the error must result in “actual prejudice.” See *Brecht*, 507 U.S. at 637. As discussed in detail
28 *supra* in Claim 3, the Supreme Court has held that it is not prejudicial for a jury to be

1 specifically instructed that it is allowed to consider gubernatorial commutation powers of an
2 LWOP sentence. *Ramos*, 463 U.S. at 1012-13. As such, petitioner cannot — due to the
3 absence of clearly established federal law to the contrary — demonstrate that the jury's receipt
4 of information or speculation regarding such a possibility is prejudicial. Accordingly, summary
5 judgment is granted to respondent on this claim.

6 **20. CLAIM 20**

7 In Claim 20, petitioner alleges that juror misconduct occurred because at least one
8 alternate juror communicated with sitting jurors and discussed their deliberations. According to
9 petitioner, this alleged communication undermines the reliability of both the guilt phase and the
10 penalty phase verdicts. This claim was raised in petitioner's first state habeas petition and
11 denied on the merits in a summary opinion by the California Supreme Court. With additional
12 factual allegations, this claim was also raised in petitioner's second state habeas petition and
13 denied by the California Supreme Court.

14 An independent review of the record reveals that the California Supreme Court's
15 summary decision denying relief on this claim was not objectively unreasonable. Petitioner
16 maintains, based on declarations from various jurors, that an alternate spoke with the sitting
17 jurors and asked them questions about the status of deliberations. Petitioner also alleges that
18 this same alternate juror passed information he received from the sitting jurors on to petitioner's
19 family members.

20 Petitioner's allegations do not amount to a credible claim of prejudicial error. The
21 Supreme Court has held that the Constitution "does not require a new trial every time a juror
22 has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217
23 (1982). The safeguards of juror impartiality, such as voir dire and protective instructions from
24 the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or
25 influence that might theoretically affect their vote. *Ibid.*; see also, *Rushen v. Spain*, 464 U.S.
26 114, 118 (1983).

27 To begin with, petitioner cannot demonstrate that the alternate juror's alleged
28 discussions with the sitting jurors — while perhaps inappropriate — were in any way

1 prejudicial to him. Petitioner can cite to no clearly established federal law holding that this type
2 of contact is prejudicial. This is not a case where the sitting jurors were being provided with
3 extrinsic information — and even if it were, extrinsic information may only be a basis for
4 habeas relief if it had a “substantial and injurious effect or influence in determining the jury's
5 verdict.” *Sassounian*, 230 F.3d at 1108 (citations omitted). While there is no Supreme Court
6 authority directly on point, the Supreme Court has found that it was not inherently prejudicial
7 for an alternate juror to remain with the sitting jurors during deliberations. *United States v.*
8 *Olano*, 507 U.S. 725 (1993). The decisions to which petitioner has cited are distinguishable
9 from the facts here. For example, in *Remmer v. United States*, 347 U.S. 227 (1954), the juror
10 had allegedly been offered a bribe by an outside source — not been asked questions by an
11 alternate juror — and an FBI investigation had resulted. And in *Parker v. Gladden*, 385 U.S.
12 363 (1966), jurors had heard from the bailiff that the defendant was wicked and guilty.

13 In addition, petitioner cannot demonstrate that the alternate juror's discussions with
14 petitioner's family members were prejudicial to him. The alternate juror did not sit on the jury
15 that rendered the verdict, and there is nothing in the juror declarations that indicates that the
16 alternate juror was relaying information to the sitting jurors from petitioner's family or that the
17 sitting jurors were aware that the alternate juror was talking to petitioner's family. Petitioner
18 can cite to no clearly established federal law holding that such a situation is inherently
19 prejudicial, and in the absence of prejudice, he is not entitled to habeas relief. *Sassounian*, 230
20 F.3d at 1108; *Brecht*, 507 U.S. at 623. Because petitioner cannot demonstrate that the state
21 court's decision is unreasonable under Section 2254(d), this claim must be denied and summary
22 judgment granted to respondent.

23 **21. CLAIM 21**

24 In Claim 21, petitioner alleges that the jurors improperly considered the fact that
25 petitioner did not testify at trial. This claim was raised in petitioner's second state habeas
26 petition and denied in a summary opinion by the California Supreme Court.

27 This claim is without merit. To begin with, as with Claim 19, *supra*, petitioner's sole
28 support for this claim is juror declarations, and petitioner has failed to show that the information

1 included in these declarations is even admissible under Fed. R. Evid. 606(b)(2). Indeed, our
2 Court of Appeals has held that testimony from jurors that they “ignored the court’s instructions
3 and discussed a defendant’s failure to testify during deliberations . . . is inadmissible under Rule
4 606(b) because . . . it does not concern facts bearing on extraneous or outside influences on the
5 deliberations.” *United States v. Rutherford*, 371 F.3d 634, 640 (9th Cir. 2004). Accordingly,
6 petitioner cannot demonstrate that the state court’s decision denying this claim was
7 unreasonable, and summary judgment must be granted to respondent.

8 **22. CLAIM 22**

9 In Claim 22, petitioner maintains that a member of the trial court staff gave information
10 to a juror that petitioner’s family was being searched for weapons before they were allowed to
11 enter the courtroom. Petitioner maintains that these remarks were prejudicial and violated his
12 rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. This claim was raised in
13 petitioner’s second state habeas petition and denied in a summary opinion by the California
14 Supreme Court.

15 An independent review of the record reveals that the state court’s summary dismissal of
16 this claim was not objectively unreasonable. *See Delgado*, 233 F.3d at 982. To begin with, the
17 only declaration petitioner has submitted in support of this claim — to the California Supreme
18 Court and to this court — is unsigned. Under California law, something more than an unsworn
19 statement is required to make a *prima facie* claim for relief, *People v. Madaris*, 122 Cal. App.
20 3d 234, 241-42 (1981), and petitioner cannot support his claim for habeas relief based on an
21 unsigned, unsworn declaration relaying a hearsay statement. Moreover, the declaration gives
22 no context as to how, when or where the juror allegedly heard the information that petitioner’s
23 family was being searched for weapons, or whether she passed the information on to other
24 jurors (Exh. G to Petitioner’s Opp. To Motion For Summary Judgment).

25 Even if petitioner had submitted a signed declaration, he would be unable to
26 demonstrate that the state court’s decision denying this claim was unreasonable. As discussed
27 *supra*, extrinsic evidence relayed to jurors may only be a basis for habeas relief if it had a
28 “substantial and injurious effect or influence in determining the jury’s verdict.” *Sassounian*,

230 F. 3d at 1108 (quoting *Brecht*, 507 U.S. at 623). In order to establish relief on a particular claim, petitioner must show that the state court's adjudication of his claim was not merely wrong but unreasonable "beyond any possibility for fair-minded disagreement," *Richter* 131 S. Ct. at 786; the information in the unsigned declaration falls well below this threshold.

Petitioner argues that if he is granted an evidentiary hearing he may be able to establish additional facts demonstrating prejudice and entitling him to relief on this claim. Under AEDPA, this is not permissible, as a federal court may not generally consider evidence beyond the state court record in determining whether there was a reasonable basis for the state court decision. *Pinholster*, 131 S. Ct. at 1398, 1400 n.7; 28 U.S.C. 2254(d). Accordingly, this claim is denied and summary judgment is granted to respondent.

23. CLAIM 23

In Claim 23, petitioner maintains that he is factually innocent and that he is entitled to habeas relief on this ground. This claim was raised in petitioner's second state habeas petition and denied in a summary opinion by the California Supreme Court.

Petitioner cannot demonstrate that the state court's denial of this claim was unreasonable pursuant to Section 2254(d). Perhaps most importantly, the Supreme Court has never held that a freestanding claim of actual innocence may serve as a basis for a grant of habeas relief, even in capital cases. *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Rather, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* More recently, the Supreme Court has reconfirmed that an actual innocence claim has never been held to be a basis for habeas relief, stating:

This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is "actually" innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged "actual innocence" is constitutionally cognizable. [Citations omitted]. A state court cannot possibly have contravened, or even unreasonably applied, "clearly established Federal law, as determined by the Supreme Court of the United States," by rejecting a type of claim that the Supreme Court has not once accepted valid.

Davis, 130 S.Ct. at 2-3.

1 In addition, even if the Supreme Court had established that freestanding claims of actual
2 innocence are cognizable on federal habeas, petitioner has not made any compelling allegations,
3 or cited to any meaningful evidence, in support of such a claim. For example, petitioner alleges
4 that he is factually innocent of rape. As the discussion of Claim 9 confirms, however, there was
5 more than sufficient evidence in the record for a rational trier of fact to conclude both that Geri
6 was alive at the time of intercourse and that she did not consent. *Rowland*, 4 Cal. 4th at 270.
7 Summary judgment on this claim must be granted to respondent.

8 **24. CLAIM 24**

9 In Claim 24, petitioner maintains that the California death penalty statutes are
10 unconstitutional in both formulation and application. Specifically, he argues that California's
11 death penalty statute is overbroad in that it allows, according to petitioner, virtually any first-
12 degree murder case to be charged as a death penalty case, in violation of the Eighth
13 Amendment. This claim was raised in petitioner's second state habeas petition and denied in a
14 summary opinion by the California Supreme Court.

15 Petitioner cannot demonstrate that the state court decision regarding this claim was
16 unreasonable under clearly established federal law. Petitioner maintains that the California
17 death penalty scheme fails to adequately narrow the class of first-degree murderers eligible for
18 the death penalty. The applicable United States Supreme Court law, however, holds that in
19 order to pass constitutional muster, a state's death penalty scheme "may not apply to every
20 defendant convicted of murder; it must apply only to a subclass of defendants convicted of
21 murder." *Tuilaepa*, 512 U.S. at 972. In *Tuilaepa*, the Supreme Court held that California's
22 death penalty scheme does appropriately narrow the class of death-eligible defendants and does
23 not apply to every defendant convicted of murder. Accordingly, this claim must be denied and
24 summary judgment granted to respondent.

25 **25. CLAIM 25**

26 In Claim 25, petitioner maintains that he was denied meaningful review of his claims on
27 direct appeal and state habeas corpus proceedings by the California Supreme Court. This claim
28 was raised in petitioner's second state habeas petition and denied in a summary opinion by the

1 California Supreme Court.

2 Petitioner is unable to demonstrate that the state court's decision is objectively
3 unreasonable. *Delgado*, 223 F.3d at 982. An independent review of the record reveals that
4 petitioner's claim has no merit.

5 As a threshold matter, petitioner has not demonstrated that these claims are cognizable
6 on federal habeas review. First, to the extent that petitioner is challenging the state court's
7 habeas review of his claims, petitioner cannot demonstrate that there is any federal
8 constitutional right to state habeas proceedings. As a result, a claim "alleging errors in the state
9 post-conviction review process is not addressable through habeas corpus proceedings."

10 *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989). Thus, petitioner's claim that the habeas
11 review of his case was unfair must be denied.

12 To the extent that petitioner is maintaining that he received an unfair direct appellate
13 review of his case, that claim is also without merit. Petitioner can cite to no clearly established
14 Supreme Court law that requires a specific type of appellate review. In addition, there is
15 nothing in the California Supreme Court's lengthy and exhaustive opinion on direct review
16 indicating that it did not meaningfully consider petitioner's claims. *Rowland*, 4 Cal. 4th at 250-
17 283. Finally, our Court of Appeals has confirmed that the California death penalty statute
18 "ensures meaningful appellate review." *Williams*, 52 F.3d at 1484.

19 In sum, because petitioner cannot demonstrate the state court's denial of this claim was
20 objectively unreasonable, this claim must be denied and summary judgment granted to
21 respondent.

22 **26. CLAIM 26**

23 In Claim 26, petitioner alleges that he was denied ineffective assistance of appellate
24 counsel. This claim was raised in petitioner's second state habeas petition and denied as
25 untimely and on the merits by the California Supreme Court.

26 The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant
27
28

the effective assistance of counsel on his first appeal as of right.¹⁰ *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). Claims of ineffective assistance of appellate counsel are reviewed according to the standard set out in *Strickland*, 466 U.S. at 668. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Moormann v. Ryan*, 628 F.3d 1102, 1106 (9th Cir. 2010). First, the petitioner must show that counsel's performance was objectively unreasonable, which in the appellate context requires the petitioner to demonstrate that counsel acted unreasonably in failing to discover and brief a merit-worthy issue. *Smith*, 528 U.S. at 285; *Moormann*, 628 F.3d at 1106. Second, the petitioner must show prejudice, which in this context means that the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal. *Smith*, 528 U.S. at 285-286; *Moormann*, 628 F.3d at 1106.

Appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. *See Jones v. Barnes*, 463 U.S. 745, 751-54 (1983); *Gerlaugh*, 129 F.3d at 1045; *Miller*, 882 F.2d at 1434 n.10. The weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. *See ibid.* at 1434. Appellate counsel therefore will frequently remain above an objective standard of competence and have caused his client no prejudice for the same reason – because he declined to raise a weak issue. *Ibid.*

To prevail on this claim, petitioner must show that there was no reasonable basis for the state court's summary denial of this claim. *Richter*, 131 S.Ct at 786. This petitioner cannot do. Indeed, petitioner does not even attempt to do so. Rather, he primarily maintains, both in his petition and in his opposition to respondent's motion for summary judgment, that he will present additional facts after discovery and an evidentiary hearing on this claim. Under AEDPA, this is not permissible, as a federal court may not generally consider evidence beyond the state court record in determining whether there was a reasonable basis for the state court decision. *Pinholster*, 131 S. Ct. at 1398, 1400 n.7; 28 U.S.C. 2254(d).

¹⁰ To the extent petitioner is alleging deficiencies by his counsel during state habeas proceedings, his claim must fail. The Supreme Court has confirmed that there is no constitutional right to effective assistance of counsel beyond trial and first appeal as of right. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Furthermore, a review of the record confirms that petitioner's appellate counsel did not fail to discover and brief a merit-worthy issue; nor is there any indication that had any additional issue been raised, petitioner would have prevailed in his appeal. *Smith*, 528 U.S. at 285-286. Accordingly, respondent is entitled to summary judgment on this claim.

27. CLAIM 27

In Claim 27, petitioner maintains that a death sentence carried out via lethal gas or lethal injection constitutes cruel and unusual punishment under international law, specifically the International Covenant of Civil and Political Rights. This claim was raised in petitioner's second state habeas petition and was denied by the California Supreme Court.

This claim is meritless and borders on frivolous. To begin with, petitioner cannot demonstrate that any claim of a violation of international law is even cognizable on federal habeas review, given that such review is designed to address claims that a petitioner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. 2254(a). International law is not United States law, and petitioner does not demonstrate that the International Covenant of Civil and Political Rights creates a form of relief enforceable in United States courts.

In addition, because there is no clearly established federal law holding that the California death penalty violates international law, and that this alleged violation creates a cognizable claim on federal habeas review, petitioner's claim must also fail on the merits. Without citation to any mandatory or persuasive authority in support of his argument, petitioner cannot demonstrate that the state court's denial of this claim was objectively unreasonable. This claim is therefore denied, and respondent is entitled to summary judgment on this claim.

28. CLAIM 28

In Claim 28, petitioner maintains the prosecutor's alleged eliciting of testimony regarding petitioner's future dangerousness from a penalty phase witness violated the Eighth Amendment and petitioner's rights to due process. The California Supreme Court addressed this claim in a reasoned opinion on direct appeal, as follows:

Defendant first complains of the prosecutor's unobjected-to cross-examination of defense witness James W.L. Park, a correctional consultant.

On direct examination, defense counsel elicited brief testimony from Park on the conditions of confinement for a person sentenced to life imprisonment without possibility of parole. He did so in an evident attempt to show substantial restrictions on freedom and minimal opportunities for violence.

On cross-examination, the prosecutor elicited testimony from Park that was briefer still on the same matter, including such specific topics as the availability of privileges, access to illicit drugs and alcohol, and the presence of women among prison staff. He did so in an evident attempt to make a showing contrary to defense counsel's, indicating the liberties that might be enjoyed and the occasions that might arise for inflicting physical harm, sexual and otherwise.

A prosecutor, of course, may seek to disprove on cross-examination what defense counsel sought to prove on direct examination. (*People v. Gordon, supra*, 50 Cal. 3d at p. 1270.) The prosecutor here did that – and substantially nothing more. Defendant asserts that the inquiry on cross-examination went beyond that on direct examination, improperly touching on future dangerousness. The assertion, however, is not supported by the record.¹¹

Rowland, 4 Cal. 4th at 275.

Respondent moves for summary judgment on Claim 28 on the grounds that, as detailed above, the California Supreme Court reasonably considered and rejected petitioner's contentions on the merits, thus foreclosing relief under 28 U.S.C. 2254(d). He also asserts that the state court's findings of facts are entitled to deference pursuant to 28 U.S.C. 2254.

Respondent is correct. Petitioner is unable to cite to any clearly established federal law

¹¹ [Opinion Footnote 16] Defendant claims that the evidence elicited on cross-examination was inadmissible under both California law and the United States Constitution. We reject the point. "It is of course, the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*People v. Benson, supra*, 52 Cal. 3d at p. 786, fn 7) [additional citations omitted].) At trial, defense counsel failed to make any objection whatsoever. Contrary to what defendant appears to argue, the omission did not constitute ineffective assistance in violation of the Sixth Amendment. Counsel's performance was not deficient; it was not "objectively unreasonable . . . to remain silent and thereby call no attention to the prosecutor's [questioning]" [citation omitted] especially when, as here questioning was relatively brief.

Defendant also claims that the prosecutor engaged in misconduct by referring in his summation to the evidence elicited on cross-examination. There was no objection. In any event, there was no impropriety. The challenged comments comprised an unproblematic argument to the effect that life imprisonment without possibility of parole was not the appropriate punishment in this case. There is no reasonable likelihood that the jury understood the words otherwise. (*People v. Clair, supra*, 1 Cal. 4th at pp. 662-663 [stating the "reasonable likelihood" standard as the test for determining whether the jury misconstrued or misapplied comments by a prosecutor].)

1 demonstrating that the state's court's conclusions were unreasonable. In fact, petitioner cites to
2 no decisions at all in support of his argument regarding this claim, arguing instead that
3 summary judgment should be denied and an evidentiary hearing held on this claim. Given that,
4 in order to establish relief on a particular claim, petitioner must show that the state court's
5 reasoned adjudication of his claim was not merely wrong but unreasonable "beyond any
6 possibility for fair-minded disagreement," *Richter* 131 S. Ct. at 786, petitioner's conclusory
7 argument is insufficient. This claim is denied and summary judgment is granted to respondent.


8 CONCLUSION

9 For the foregoing reasons, respondent's motion for summary judgment is **GRANTED** as
10 to all claims. Petitioner's motion for an evidentiary hearing is **DENIED** as to all claims. The
11 petition for a writ of habeas corpus is **DENIED** as to all claims.

12 Rule 11(a) of the Rules Governing Section 2254 Cases now requires a district court to
13 rule on whether a petitioner is entitled to a certificate of appealability in the same order in
14 which the petition is denied. Petitioner has failed to make a substantial showing that his claims
15 amounted to a denial of his constitutional rights or demonstrate that a reasonable jurist would
16 find the denial of his claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
17 Consequently, no certificate of appealability is warranted in this case.

18
19 **IT IS SO ORDERED.**

20 Dated: October 2, 2012.

21 
22 WILLIAM ALSUP
23 UNITED STATES DISTRICT JUDGE
24
25
26
27
28